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92
OKLAHOMA REPORTS

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VOLUME XXXV

CASES DETERMINED

IN THE

SUPREME COURT

OF THE

State of Oklahoma

November, 1912—April, 1913.

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HOWARD PARKER, *State Reporter*


Warden Co., Oklahoma City

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INDIAN TERRITORY CASES APPEALED TO THE CIRCUIT COURT OF APPEALS AND THE SUPREME COURT OF THE UNITED STATES

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- Capital Townsite Co. v. Fox et al., 6 Ind. T. 223; 152 Fed. 697.
Smith v. Armour Packing Co., 6 Ind. T. 479; 158 Fed. 86.
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- Chicago, R. I. & P. Ry. Co. v. Pounds, 1 Ind. T. 51; 82 Fed. 217.
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Moffett-West Drug Co. v. Byrd, 1 Ind. T. 612; 92 Fed. 290.
Hargardine-McKittrick Dry Goods Co. v. Bradley, 1 Ind. T. 650; 96 Fed. 914-916.
Kanney-Alton Merc. Co. v. Mineral Belt Cons. Co., 2 Ind. T. 134; 104 Fed. 595.
McFadden v. Blocker, 2 Ind. T. 260; 105 Fed. 293-312.
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Wilhite v. Skelton, 5 Ind. T. 621; 149 Fed. 67.
Gulf, C. & S. F. Ry. Co. v. Miseley, 6 Ind. T. 369; 161 Fed. 72.
M., K. & T. Ry. Co. v. Wilhoit, 6 Ind. T. 534; 160 Fed. 440-442.
Atoka Coal & Mining Co. v. Miller, 7 Ind. T. 104; 170 Fed. 584.

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- Kelly et al. v. Johnson, 1 Ind. T. 184; 82 Fed. 1002.
G. W. Walker Trading Co. v. Grady Trading Co., 1 Ind. T. 191; 81 Fed. 1003.
Noble v. Worthy, 1 Ind. T. 523; 91 Fed. 1003.
Noble v. Worthy, 1 Ind. T. 523; 91 Fed. 1003.
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212 U. S. 291, 29 Sup. Ct. Rep. 395.

THE
SUPREME COURT

STATE OF OKLAHOMA

SEPTEMBER TERM, 1912

PRESENT:

JOHN B. TURNER, CHIEF JUSTICE.
SAMUEL W. HAYES, VICE CHIEF JUSTICE.
R. L. WILLIAMS,
MATTHEW J. KANE, } JUSTICES.
JESSE J. DUNN,

TICER v. STATE *ex rel.* HOLT, *County Attorney.*

No. 3651. Opinion Filed November 7, 1912.

(128 Pac. 493.)

1. **COUNTIES — County Commissioners — Fees.** The county commissioners, after the close of the session of the Legislature of Oklahoma Territory in 1901 (Sess. Laws 1901, c. 21), were not entitled to compensation of \$1.50 per day as overseers of the poor.
2. **SAME—Expenses—Reimbursement.** A commissioner being authorized by the board of commissioners of his county to superintend the laying out or surveying of a road whilst engaged in such business, and being duly authorized thereto, paid in cash out of his personal fund the sum of \$5 to a chain bearer, who carried the chain in the survey of such road in said commissioner's district, said sum of \$5 being a reasonable compensation for such work. Said commissioner thereafter charged to and collected from his county the sum of \$5 as a reimbursement of said amount as expended by him. Held, that it was permissible for the board of county commissioners to reimburse him in said amount.

(Syllabus by the Court.)

Ticer v. State ex rel. Holt, Co. Atty.

*Error from Superior Court, Pottawatomie County; -
G. C. Abernathy, Judge.*

Action by the State on relation of C. P. Holt, County Attorney, against N. A. J. Ticer. Judgment for plaintiff, and defendant brings error. Reversed in part.

Edward Howell, for plaintiff in error.

C. P. Holt, for defendant in error.

WILLIAMS, J. The following specifications of error are made by the counsel for plaintiff in error: (1) Were the county commissioners, prior to the going into the effect of the act of May 29, 1908 (Sess. Laws 1907-08, pp. 217, 218), entitled to compensation of \$1.50 per day as overseers of the poor? (2) Were they entitled to reimbursement of moneys expended by them when engaged in work directed by the board, and for purposes for which the parties to whom the moneys were paid were entitled to pay from the county?

1. Sections 3645 and 3663, St. Okla. 1893, are as follows:

"3645. The county commissioners of the several counties of this territory shall be the overseers of the poor within their several counties and shall perform all duties with reference to the poor within their respective counties that may be prescribed by law. Every board of county commissioners shall, in discharging the duties imposed by this act, be designated as overseers of the poor. * * *

"3663. The overseers of the poor in each county shall be entitled to receive each one dollar and fifty cents per day for each and every day during which they shall be necessarily employed in the discharge of their several duties as such, to be allowed by the board of county commissioners."

These, as sections 1 and 19 of the act passed by the Legislature of 1890 (St. 1890, c. 66) entitled, "An act in relation to the settlement and support of the poor," took effect on December 24, 1890.

Section 2898, St. Okla. 1893, is as follows:

"The county commissioners shall be allowed for time actually and necessarily employed, a *per diem* of three dollars each, and five cents per mile for each mile necessarily traveled in discharge of their official duties."

Opinion of the Court.

This, as section 45 of an act passed by the Legislature of Oklahoma Territory 1890 entitled, "An act establishing fees and salaries of public officers," took effect on December 25, 1890. Section 1 of said act (section 2854, St. Okla. 1893) also provides:

"That the officers and persons herein mentioned shall be entitled to receive for their services only the fees and compensations herein allowed, and no other, except as may be otherwise provided by law."

An act passed March 12, 1897, entitled, "An act to regulate the fees and salaries of county officers and for other purposes, and to repeal articles 1 and 2, of chapter 25, of the Session Laws of Oklahoma Territory of 1895, and section 7 of article 1 of chapter 73, of the Statutes of Oklahoma Territory of 1893," provides as follows:

"That the officers and persons herein mentioned shall be entitled to receive for their services only the fees and compensation herein allowed, and no other, except as may be otherwise required by law." (Section 1, c. 15, p. 160, Sess. Laws 1897.)

"The county commissioners shall be paid an annual salary, payable quarterly, as follows: In counties of ten thousand population or less, the sum of one hundred and fifty dollars each; in counties of more than ten thousand and less than fifteen thousand, the sum of two hundred dollars each; and in counties of more than fifteen thousand population the sum of two hundred and fifty dollars each. * * *" (Section 61, c. 15, p. 179, Sess. Laws 1897.)

By this act all provisions of law providing compensation for county commissioners were expressly repealed. See section 64, c. 25, p. 143, Sess. Laws 1895.

The Legislature of Oklahoma Territory of 1901 passed an act entitled, "An act for the support of the poor of the several counties of the territory of Oklahoma and to establish and maintain asylums therefor." (Chapter 21, pp. 156, 161, Sess. Laws 1901.)

Section 1 of said act provides:

"The county commissioners of the several counties of the territory of Oklahoma shall be overseers of the poor for their respective counties, and shall perform all the duties with reference to the poor of their said counties that may be prescribed by law."

Section 2 of the same act provides for the purchase of a poor farm and the erection of buildings thereon, and section 3 for the

Ticer v. State ex rel. Holt, Co. Atty.

renting of a suitable place to establish a county asylum or poor farm. Section 4 provides the conditions under which the board may furnish relief to poor and indigent persons residing within the county. Section 8 provides for the employment of some suitable person to take charge of the poor farm or the county asylum; such person to be called the superintendent of the county asylum. This is a comprehensive act relating to the poor and insane of the several counties of the state. The question arises as to whether this act by substitution takes the place of the act of 1890 entitled, "An act in relation to the support of the poor." A repeal by substitution is effected where the latter of two acts covers the whole subject of the first, and plainly shows it was intended as a substitute therefor.

The act of 1901 pertains to the same subject-matter and seeks to accomplish the same general purpose, and in the main is a re-enactment of those statutes in the same language except enlarging the plan for the support of the poor of the several counties of the territory. It is clear that said act was intended by said Legislature as a substitute for all the laws then existing upon the subject-matter dealt with therein, and that the act of 1890, relating to the support of the poor, was entirely repealed. *J. W. Ripey & Son v. Art Wall Paper Mill*, 27 Okla. 600, 112 Pac. 1119; *State ex rel. West et al. v. McCafferty, County Treasurer*, 25 Okla. 2, 105 Pac. 992; *Smock v. Farmers' Union State Bank*, 22 Okla. 825, 98 Pac. 945; *Fritz v. Brown*, 20 Okla. 263, 95 Pac. 437.

The act of March 12, 1897, provides an annual salary for the county commissioners, and the fact that, by the repealing of said act of 1890, the compensation of the county commissioners as overseers of the poor at the rate of \$1.50 per day was taken away and certain duties relative to their overseeing the poor were continued, in and of itself is no argument against the repeal of the law; for there was no limitation upon the powers of the Legislature of the territory of Oklahoma against reducing the compensation of public territorial officers during their terms.

An officer is not entitled to receive compensation from the state or county unless it is given to him by the Constitution or statute. *Coggeshall v. Conner*, 31 Okla. 133, 120 Pac. 559; *State*

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v. Brewer, 59 Ala. 130; *Throop on Public Officers* (1892) sec. 478, and authorities cited in footnote 2. Where compensation is given to an officer by a constitutional or statutory provision, whether by salary or fees or commissions or otherwise, it is in full of all his official services, and he is not entitled to demand or receive any additional compensation from the public for any service within the line of his official duty, although his duties have been increased, or entirely new duties have been added since he assumed office, or, if his compensation consists of fees, although the service is one for which no fee is provided by law. *State v. Brewer*, 59 Ala. 130; *People v. Supervisors of New York*, 1 Hill (N. Y.) 362; *Heslep v. Sacramento*, 2 Cal. 580; *Throop on Public Officers* (1892) sec. 478, and authorities cited in footnote 2. See, also, *Coggleshall v. Conner*, *supra*.

2. Paragraph 5 of the agreed statement of facts is as follows:

"That during said time the said N. A. J. Ticer charged to, and collected from, the county of Pottawatomie the sum of \$5 upon claims Nos. 1756 and 1597; that the said \$5 was paid to said county commissioner as reimbursement to him for money that he paid in cash out of his personal funds to chain carriers for work who were working in the said commissioner's district in the survey of a county road; that said amount of \$5 was a reasonable compensation for said work of chain carriers, and said county commissioner was authorized by the board of county commissioners to oversee the survey of the said road."

Section 7757, Comp. Laws 1909 (Sess. Laws 1909, p. 487), provides:

"The right of way for any public road shall be paid for by the township in which such right of way lies; provided where such right of way runs along municipal township lines the cost shall be borne equally by each township. The county commissioners shall certify to the township board the price of such right of way, whether same is fixed by amicable settlement or condemnation proceedings and upon receipt of such certificate the township board shall draw warrants on the proper officers for a sufficient amount to cover such price. The cost incident to any proceedings to obtain right of way, except the price of the land and damages, shall be paid by the county."

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In *Allen et al. v. Com'rs of Pittsburg County*, 28 Okla. 773, 116 Pac. 175, paragraph 2 of the syllabus is as follows:

"Section 1659, Comp. Laws 1909, having provided, 'No account shall be allowed by the county commissioners unless the same shall be made out in separate items, and the nature of each item stated, * * * which account so made out shall be verified by affidavit setting forth that the same is just and correct and remains due and unpaid, which account shall be regularly filed with the county clerk five days before the first day of the meeting of the county commissioners,' it is essential that such requirements be complied with in order for such board to acquire jurisdiction to allow same. (b) An account having been made out in separate items, but not in any way having been verified by affidavit 'setting forth that the same is just and correct and remained due and unpaid,' although regularly filed with the county clerk five days before the first day of the meeting of said board, jurisdiction was not acquired so as to allow same."

The judgment of the court in this case is as follows:

"The court further finds from the petition and agreed statement of facts that the defendant paid in cash out of his personal fund the sum of \$5 to a chain carrier, who carried the chain in a survey of a county road in the third commissioner's district of Pottawatomie county, and that said amount of \$5 was a reasonable compensation for said work, and that the defendant was authorized by the board of county commissioners to oversee the survey of said road, and that thereafter the defendant charged to, and collected from, the county of Pottawatomie the sum of \$5 as a reimbursement of the amount of the payment made by him. There appearing no extraordinary condition rendering it necessary for the defendant to pay said sum out of his own funds, the court is of opinion that the defendant could not legally make the county of Pottawatomie his debtor in that manner, and no reason appearing why the person so carrying the chain did not or should not file the claim on his own behalf, the court holds that said claim was improper and that the plaintiff should recover said item. And judgment should be for the plaintiff and against the defendant for \$5, the amount of said item."

No contention was made that the claim was not filed by the plaintiff in error in accordance with section 1659, Comp. Laws 1909, which is construed in *Allen v. Com'rs of Pittsburg County*, *supra*, and it appears that the county would have been liable for

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the claim if made out in accordance with the requirement of said section by said chain carrier.

Where the law requires an officer to do what necessitates an expenditure of money for which no provision is made for the supplying him with the cash in hand, he may pay therefor and have the amount allowed him. *United States v. Flanders*, 112 U. S. 88, 5 Sup. Ct. 67, 28 L. Ed. 631; *Kirkwood v. Soto*, 87 Cal. 394, 25 Pac. 488; 23 Am. & Eng. Encyc. of L. (2d Ed.) 388. Before a claim is a valid claim against the county or state, there must be an express provision of law to fix such liability.

It was the duty of the county commissioners to lay out this road. In order to do that, it was necessary to survey the same. In order to have it surveyed, it was necessary to have a chain carrier, and they were authorized to employ and pay such chain carrier. It was permissible for them to empower one of their members to make such employment. *House v. Los Angeles County*, 104 Cal. 73, 37 Pac. 796. The plaintiff in error, having paid the chain carrier who had a valid claim against the county for labor previously performed, was subrogated to the rights of the chain bearer. Throop on Public Officers (1892) sec. 45, p. 51; *Bliss v. Lawrence*, 58 N. Y. 442, 17 Am. Rep. 273; *Stephenson v. Walden*, 24 Iowa, 84.

Section 2408, Wilson's Rev. & Ann. St. 1903, provides:

"That it shall be unlawful for any public officer or deputy or employee of such officer to either directly or indirectly buy, barter for, or otherwise engage in any manner in the purchase of any bonds, warrants or any other evidence of indebtedness against this territory, any subdivision thereof, or municipality therein, of which he is an officer." (Section 2, art. 3, c. 12, Sess. Laws 1899, p. 123.)

This provision, however, does not appear to cover this transaction. The term "or, any other evidence of indebtedness against this territory, any subdivision thereof, or municipality therein, of which he is an officer," is *ejusdem generis*, and applies only to bonds, warrants, or other evidence of indebtedness of that character. *Thompson et al. v. Rearick*, 34 Okla. 283, 124 Pac. 951; *Maben v. Rosser et al.*, 24 Okla. 588, 103 Pac. 674.

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It follows that the court erred in finding against the plaintiff on the \$5 item. The judgment against the plaintiff in error in favor of the defendant in error for the sum of \$5 will be here reversed and rendered. As to the judgment against the defendant in error in favor of the plaintiff in error for the sum of \$142 and interest, the same will be affirmed.

HAYES, KANE, and DUNN, JJ., concur; TURNER, C. J., absent, and not participating.

KISER v. NICHOLS.

No. 2073. Opinion Filed November 16, 1912.

(128 Pac. 103.)

APPEAL AND ERROR—Review—Refusal of New Trial. Where controverted questions of fact are submitted to a jury, and the evidence adduced is conflicting and contradictory, but there is competent evidence reasonably tending to support every material averment necessary to uphold the verdict, and the trial court in its instructions to the jury fully and fairly states the issues and fixes the burden thereon as the same are presented by the pleadings and evidence, and a verdict is rendered which, from all the facts, appears to meet the requirements of justice, which is approved by the trial court, and judgment is rendered in accordance therewith, this court will not reverse the order of the trial court denying a motion for a new trial.

(Syllabus by the Court.)

*Error from Jackson County Court;
W. T. McConnell, Judge.*

Action by G. C. Kiser against Nannie Nichols. Judgment for defendant, and plaintiff brings error. Affirmed.

W. C. Austin, for plaintiff in error.

Everett Petry, for defendant in error.

DUNN, J. This case presents error from the county court of Jackson county. March 4, 1909, the plaintiff in error, as plaintiff, filed his petition in the said court, alleging that the defendant had in her possession, and was unlawfully detaining from him,

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two mules of the value of \$215, for the return of which, with damages for the withholding thereof, he prayed judgment. In his petition plaintiff alleged an agreement between himself and the defendant, wherein she was to take the mules and hold the same conditionally on a proposed contract of purchase and sale of certain lands located in Pecos county, Tex., which had recently been inherited by her and her minor children from her deceased husband. It avers that the understanding under which the defendant secured the mules was that if plaintiff's brother, then living in Texas, would join with plaintiff in the purchase of the land at the price of \$600 that the defendant would take title to the said mules, giving plaintiff credit on the sale for the sum of \$215, but in case the plaintiff's brother failed or refused, for any reason, to enter into said agreement and join with plaintiff in the purchase of said land that the title to the said mules should remain in plaintiff, and he would be entitled to the immediate possession and surrender thereof; that plaintiff's brother declined to enter into the contract, and plaintiff demanded the return of the mules, which was refused. Defendant answers, in effect, that she had agreed to sell her interest in the said land for the sum of \$300, and had received the mules in payment of \$215 of the said sum; that plaintiff agreed to advance the money necessary to pay the costs of the court and the procedure necessary to obtain an order for the sale of the said land, and to advance the sums necessary to pay the taxes and accrued interest on an indebtedness owed on the land; that she had at all times stood ready to complete her part of the agreement in accordance with the terms thereof, but that plaintiff had refused to advance the said money and to take the necessary steps to obtain the order of sale in accordance with the terms of the agreement. On the trial had before a jury, verdict was entered for defendant, and, after the denial of a motion for new trial, the cause has been lodged in this court for review.

The issue made in this court is that the verdict is not supported by the evidence, and error in the giving and refusal of certain instructions. Counsel for plaintiff admits that on the material facts involved the evidence is conflicting, and from a perusal

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thereof we are convinced that the same would support a verdict for either party. Under these circumstances, the verdict of the jury is conclusive upon us. We are without authority to take the evidence of the different witnesses and, weighing the same, determine on which side the truth lies. This duty is imposed on the trial jury, and when it has acted on sufficient evidence its conclusion is final. This court said, in the case of *City of Wynnewood v. Cox*, 31 Okla. 563, 122 Pac. 528:

"The evidence in support of the verdict of a jury on appeal in this court is regarded as true, and the evidence against it is deemed, for sufficient reasons, to have been rejected; and where all of the evidence supporting a verdict, taken together and given all of the presumptions and deductions to which it is reasonably susceptible, is sufficient, then this court will not go behind the verdict and set it aside, on the ground that the counter-vailing evidence offered, had it been accepted, would have justified a different one."

See, also, *Jeffers v. Hensley*, 28 Okla. 519, 114 Pac. 1101.

Counsel contends that a contract by the defendant to sell to plaintiff the entire tract of land inherited by both herself and her children was void, and that because of this fact he was entitled to recover his property. The contention of the defendant, as we have seen, is that she sold to him but her interest in the land, and on this issue the court instructed the jury that one heir could not contract to convey the interest of another heir, and a contract to make title to the whole estate would be void; and that if title could not be made to the land by the defendant that then the jury should find for plaintiff. As the evidence on this point was conflicting, the verdict of the jury must be held to have determined it against the contention of plaintiff. The evidence of the defendant was that the mules were traded to her for her interest in the land, and that she stood ready to keep her contract at all times. Such a contract, we think, she had a right to make. We have been cited to no statute or authority holding against it, and we know of none.

An inspection of the entire record, the evidence heard, the instructions given and refused, convinces us that the trial was

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without error, and the issues were fairly presented. Under these circumstances the judgment of the trial court is affirmed.

HAYES and KANE, JJ., concur; TURNER, C. J., and WILLIAMS, J., absent, and not participating.

DUFFIELD v. INGRAHAM.

No. 2080. Opinion Filed November 16, 1912.

(128 Pac. 111.)

NEW TRIAL—Grounds—Death of Judge. Where, prior to the passage of the act of March 9, 1910 (Sess. Laws 1910, p. 59), a trial judge died within the time allowed to sign and settle a case-made, his successor was not authorized to perform such duty; and the aggrieved party, being by reason of such unavoidable casualty or misfortune prevented from prosecuting his appeal to this court, will be given a new trial.

(Syllabus by the Court.)

Error from Pawnee County Court;
H. T. Conley, Judge.

Action between N. R. Duffield and M. F. Ingraham. From the judgment, Duffield brings error. Reversed and remanded.

E. M. Clark, for plaintiff in error.

Eagleton, Biddison & Merritt, for defendant in error.

DUNN, J. This case presents error from the county court of Pawnee county. Subsequent to the denial of the motion for new trial, November 3, 1909, and during the time for service of the case-made, Judge H. T. Conley, the trial judge, died. Thereafter the case-made was settled by County Judge N. E. McNeill, and filed in this court. After the rendition of the case of *J. W. Ripey & Son v. Art Wall Paper Mill Co.*, 27 Okla. 600, 112 Pac. 1119, decided on the 16th day of November, 1910, and invoking the rule therein laid down, counsel for plaintiff in error presented evidence showing the death of the trial judge on February 26, 1910. Under the authority of the above case, there-

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fore, the cause will be remanded to the trial court, with instructions to set aside the judgment heretofore rendered and grant plaintiff in error a new trial.

HAYES and KANE, JJ., concur; TURNER, C. J., and WILLIAMS, J., absent, and not participating.

MISSOURI, O. & G. RY. CO. v. HAZLETT & PRICE.

No. 2103. Opinion Filed November 16, 1912.

(128 Pac. 105.)

1. **CARRIERS—Freight—Delay in Delivery.** In an action against a common carrier for negligent delay in the carriage and delivery of machinery intended for use, the proper measure of damages, in the absence of special notice, is the usable or rentable value of the machinery during the period of delay, together with such reasonable expenses as may be incurred by plaintiff in searching for, recovering, or in endeavoring to secure delivery.
2. **SAME—Damages.** On the trial of an action for damages alleged to have been caused by negligent delay in the delivery of certain well machinery, plaintiff, without notice that employees' wages would be lost in the event of delay in delivery, was permitted to recover for the same. **Held, error.**

(Syllabus by the Court.)

Error from District Court, Coal County;
A. T. West, Judge.

Action by Hazlett & Price against the Missouri, Oklahoma & Gulf Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed on conditions.

E. R. Jones and M. L. Perkins, for plaintiff in error.

D. H. Linebaugh, for defendant in error.

DUNN, J. This case presents error from the district court of Coal county. The action was brought and judgment rendered for and on account of the negligent delay of fifteen days on the part of the railway company, plaintiff in error, of an outfit of well-drilling machinery.

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But one question of substantial merit is presented, which arises on the admission of evidence allowing recovery by plaintiffs, defendants in error here, of certain wages due two employees of plaintiffs at \$5 per day each during the said delay. Recovery was allowed for the usable or rentable value of the machinery, also for certain portions of it which were lost, and for expenses incurred by plaintiffs in pursuing and recovering it. As the petition did not aver notice to the railway company that the plaintiffs had then engaged the said employees, whose wages would be lost if the delivery was delayed, and as the evidence shows no such notice to have been given at the time at which the contract was entered into, the allowance of the same by the court was error.

Section 2888, Comp. Laws 1909, lays down the rule, providing that "for the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." This is the rule applicable in this case; and where special damages are claimed, such as those here involved, in order to render the party charged liable therefor, the claim must be based upon a notice given at the time the contract is made.

The case of *Hadley v. Baxendale*, 9 Exch. 341, is relied upon by counsel for defendant. The case of *Illinois Cent. R. Co. v. Johnson & Fleming*, 116 Tenn. 624, 94 S. W. 600, was one where in damages were sought for the negligent delay in transporting and delivery of certain iron pipes and other implements for use in boring a well. The Supreme Court of that state, discussing the proper rule in such cases, says:

"The rule which the plaintiffs below invoke, and upon which they rely in this court, is that announced in *Hadley v. Baxendale*, 9 Ex. 341. This rule has been so frequently quoted and applied in the opinions of this court that it is unnecessary to set it out literally here. It is sufficient to say that under this rule a party who sues for a breach of contract is entitled to recover damages which result from that breach according to the usual

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course of things, or such as may be reasonably supposed to have been in the contemplation of both parties, at the time the contract was made, as the probable breach of it. Under the latter branch of the rule, it has been universally held that in order to recover special damages, such as are claimed by the defendants in error in this case, the party against whom recovery is sought must have had such notice as would give him to understand that a breach of the contract would probably result to the other party in these special damages. In *Machine Co. v. Compress Co.*, 105 Tenn. 187, 58 S. W. 270, where this rule was enforced, it was insisted by the plaintiff in error, against whom it was applied, that, granting the authority of the rule, yet that was not a proper case for its application, because the plaintiff in error was not sufficiently put on notice of the extraordinary damages it might incur from a breach of the contract. To this the court made reply: 'No case holds, in order to put this rule in operation, that the party invoking it must have said to the other party at the moment of making the contract he would claim these damages for a breach; but it may be conceded the knowledge must be brought home to the party sought to be charged, under such circumstances, that he must know that the person he contracts with naturally believes that he accepts the contract with a special condition attached; * * * or, as is said by Mr. Sedgwick, "notice must be more than knowledge on the defendant's part of the special circumstances. It must be of such a nature that the contract was, to some extent, based upon the special circumstances."'

In the case of *Texas & Pacific Ry. Co. v. Hassell*, 23 Tex. Civ. App. 681, 58 S. W. 54, Chief Justice Rainey, discussing the measure of damages for delay in shipment of a feather-renovating machine, speaking to the same point, said:

"Mr. Hutchinson, in his work on Carriers (section 776), lays down the rule thus: 'Where the goods are not intended for sale in the market of destination, but are intended to serve some specific purpose of the owner, the rule that the carrier will be liable for depreciation in the market value during his negligent delay will, of course, not be applicable; and in the absence of special circumstances which may make the carrier liable for some special loss, or for the expense to which the owner may be put by his negligent delay, he could be held liable only for the inconvenience to which the owner had been put by being deprived of the use of his property during the time of the delay, which must be determined as a question of fact by the jury by ascertaining from the evidence the value of its use, the criterion

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of which would be, in most cases, its rental value during the delay; or, in case of an absolute refusal to transport according to contract, for such time as would be requisite to obtain the article by another conveyance, or from some other source.' This rule is supported by the great weight of authority. It conforms to the well-recognized rule announced in the leading case of *Hadley v. Baxendale*, 9 Exch. 353, which is: 'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.' *Express Co. v. Darnell*, 62 Tex. 639. The natural and proximate result flowing from the delay in transporting the machine was the loss of its use during that time, and such loss must be considered as having been contemplated by the initial carrier at the time the contract of carriage was entered into, and by all connecting carriers over whose roads the shipment was transported. Of course, special damages will not be considered as being in the contemplation of the parties, unless the conditions out of which such damages might ordinarily arise are made known to the carrier at the time the contract is made."

In the case of *Priestly v. Northern Ind. & Chicago R. Co.*, 26 Ill. 205, 79 Am. Dec. 369, which was an action against a common carrier for the negligent delay in delivering certain planing mill machinery, in the discussion of the case, the court said:

"The true rule is laid down in *Green v. Mann*, 11 Ill. 613, which was an action for a failure to put certain additional machinery into a mill, which the plaintiff had rented of the defendant's intestate. This court says: 'The true measure of damages in this case was the value of the use of that portion of the machinery which Stadden had contracted to furnish, and which, by reason of his failure to do, Mann was unable to enjoy.' In this case the inquiry should have been: What was the value of the use of such machinery in such a factory for the time it was detained? In other words: What was a reasonable rent for it? For what sum could plaintiffs have hired equal machinery of that description? As this is an action on the case for a wrong done, had the plaintiffs notified the defendants for what purpose they desired the machinery, and the circumstances of their necessities, they might have brought forward other topics and elements

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of damage, such as they attempted to show on the trial—that a large number of hands were, of necessity, under pay and idle; loss of promised custom, out of which profits would have been made. In the absence of notice, proof of this kind was properly rejected.”

The foregoing cases announce the uniform rule which seems to obtain throughout every jurisdiction. Other authorities are collated in the notes to section 776, Hutchinson on Carriers, vol. 3, section 136, Hale on Bailments and Carriers, and 6 Cyc. 449, note 17.

We have taken note and considered the other exceptions to the conduct of the trial, but, in our judgment, they are without merit. The damages allowed, with the exception of the wages for the employees, in our judgment, were proper. The judgment rendered was for \$525. Just how this sum was reached by the jury, the record does not disclose, and we are not able to ascertain it. The proof in reference to the wages of the employees showed that the same amounted to \$150, which was undisputed, and probably was allowed by the jury, as the court instructed them that it was a proper element of damage. Under these circumstances the case is remanded to the trial court, with instructions to grant plaintiffs 30 days within which to remit \$150, and the judgment, with costs in this court divided, will otherwise stand affirmed. In the event this is not done, and no remission is made, the judgment of the trial court will be set aside and plaintiff in error granted a new trial.

TURNER, C. J., and HAYES and KANE, JJ., concur; WILLIAMS, J., not participating.

In re Appeal of McNeal.

In re APPEAL OF McNEAL.

No. 3357. Opinion Filed November 16, 1912.

(128 Pac. 285.)

1. **TAXATION—Equalization—Power of State Board.** Assuming that that portion of section 1, art. 3, c. 28, Sess. Laws 1899, limiting the power of the State Board of Equalization to the valuation as returned by the several county boards of equalization, to have been valid when passed, and not repugnant to the Constitution, nor locally inapplicable, and hence was brought over, extended to, and remained in force in the state of Oklahoma, yet, being in conflict with section 1 of article 7, c. 38, p. 599, Sess. Laws 1909 (section 7620, Comp. Laws 1909), the same was repealed thereby.
2. **SAME.** Under section 21 of article 10 of the Constitution (section 286, Williams' Ann. Const. Okla.), it is made the duty of the State Board of Equalization to adjust and equalize the valuation of the real and personal property of the several counties in the state; and under section 1 of article 7, c. 38, p. 599, Sess. Laws 1909 (section 7620, Comp. Laws 1909), it was made its duty "to equalize, correct and adjust the same as between the counties by increasing or decreasing the aggregate assessed value of the property or any class thereof, in any or all of them, to conform to the fair cash value thereof," and its action thereunder is not void and unconstitutional for the sole reason that in thus equalizing, adjusting, and correcting the various assessments it raised the valuations of real and personal property in all of the counties of the state, thereby increasing the aggregate assessment as returned to it by the various county clerks.
3. **SAME.** Section 1 of article 7, c. 38, p. 599, Sess. Laws 1909 (section 7620, Comp. Laws 1909), providing, "it shall be the duty of said board [State Board of Equalization] to examine the various county assessments and to equalize, correct and adjust the same as between the counties by increasing or decreasing the aggregate assessed value of the property or any class thereof," is not repugnant to nor in conflict with section 21 of article 10 of the Constitution (section 286, Williams' Ann. Const. Okla.), which provides: "The duty of said board shall be to adjust and equalize the valuation of real and personal property of the several counties in the state, and it shall perform such other duties as may be prescribed by law."
4. **SAME.** The action of the State Board of Equalization in equalizing, correcting, and adjusting the various county assessments by increasing or decreasing the value of any or all of the different classes of real and personal property, as the same are provided for by the revenue laws of the state, in order to make their valuation conform to the fair cash value thereof, is valid.

(Syllabus by the Court.)

Turner, C. J., and Williams, J., dissent.

In re Appeal of McNeal.

Appeal from the State Board of Equalization.

Appeal by J. W. McNeal from the State Board of Equalization. Action of the Board affirmed.

C. G. Hornor, for appellant.

Chas. West, Atty. Gen., and *W. C. Reeves*, Asst. Atty. Gen., for Board of Equalization.

Blake & Boys, amici curiae.

DUNN, J. This case presents to this court an appeal from the State Board of Equalization on its action in equalizing, adjusting, and correcting the assessed valuation of property of the several counties of the state for the year 1911. December 1, 1911, appellant filed in this court his petition, which contained the following averments:

"That on or about July 26, 1911, the State Board of Equalization of the state of Oklahoma met at the office of said board, in Oklahoma City, with all members present. That thereafter, from time to time, and up until the 2d day of October, 1911, said board continued to meet for the purpose of equalizing the values of real and personal property in said state for taxation. * * * That at said proceedings said State Board of Equalization raised the values of all real estate and of all personal property in all the counties of the state of Oklahoma from seven hundred eighty-four million five hundred eleven thousand nine hundred sixty-five dollars (\$784,511,965.00), as returned by local assessors to the county clerks of the respective counties of said state and by them returned to the Auditor of said state, and to the State Board of Equalization, to the sum of one billion, seventy-five million, seventy-eight thousand, four hundred ninety-six dollars (\$1,075,078,496.00). That in making said general raise the values of all the real estate in all the counties of the state, and also of all the personal property in all the counties of the state, were by said board raised over and above the amount turned in, as aforesaid, by local assessors and thereafter certified to said State Auditor and said Board of Equalization. * * * That in making said raises and in all of said proceedings the State Board of Equalization did not adjust and equalize the value of real and personal property of the several counties of the state, but, in effect, assessed said property in violation of the Constitution and laws of the state. * * * That in said proceedings the

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said Board of Equalization not only raised the valuations of real and personal property in every county of the state, but raised the sum total of said valuation over and above the values fixed by local assessors and turned in to the county clerks, and by them certified to the State Auditor, in the sum of nearly three hundred million dollars, as set out and shown in said transcript, all of which was wrongful, illegal, and without power and jurisdiction on the part of said board so to do."

During the course of the proceeding appellant filed a petition before the said board, objecting to its action in raising said valuations, and by counsel, C. G. Hornor, Esq., appeared before said board in support thereof. On this, his petition in this court.—

"Appellant avers that said Board of Equalization denied his said petition, for the reason and upon the ground, as claimed by them, that they were not, in effect, assessing property in said state, but were adjusting and equalizing the valuations thereof, and that in the said action herein complained of they did not, in effect, assess said property for taxation, but did adjust and equalize the valuations thereof, and that in what they did they were acting, and did act, within the scope of their powers and duties. Appellant avers that there was and is error in the proceedings of said board, in that by what they did, as set out and shown in the transcript, they did not adjust and equalize the values of real and personal property of the several counties of said state, and did in effect assess said values, and did thereby assume the functions and did supersede the officers of the state designated and empowered by law to assess the values of property in said state, and did override and set aside the acts of the legal assessors of the state, and that in all of said matters and things said Board of Equalization did exceed its powers, and that its said actions were unlawful and void."

The prayer was that the action of the state board be vacated and set aside and annulled, and the board be required, by order of this court, to convene, and to proceed to adjust and equalize the valuation of real and personal property of the several counties of the state, as required by the Constitution.

From the foregoing, and from the brief filed in support thereof and the answer brief of the Attorney General representing the state, but one question is presented, to wit: Was the State Board of Equalization empowered by the Constitution and statutes of this state to raise the aggregate of the assessed valua-

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tion of the property of the state, as the same was returned by the county clerks of the respective counties of the state to the State Auditor and to the said board? It is the contention of counsel for appellant that the action taken by the board was not "equalization," but was, in fact, a revaluation or reassessment of all property in the state; that the power to assess is not vested in the State Board of Equalization, but is vested solely in the local assessors, who view the property.

Thus it will be seen that herein is rejuvenated the aged question which received the consideration of the territorial Supreme Court in the middle and later '90's, and we are called on in this proceeding to again review the much-mooted question of the power of the tax-assessing, equalizing, and levying officials in this jurisdiction. Considering the question here raised in connection with the history of the territorial legislation and the action of the territorial board thereon, together with the adjudications of the Supreme Court of the territory, and the legislation, both constitutional and statutory, of the state, and giving to it the force to which we deem it entitled, leaves but little necessity, in the determination thereof, for extended consideration of the adjudications of other states.

Section 6 of the Organic Act of the territory of Oklahoma provided against any unequal discrimination in taxing different kinds of property, and that "all property subject to taxation shall be taxed in proportion to its value." The territorial Legislature, in its act of March 8, 1895 (section 1, art. 1, c. 43, p. 215, Sess. Laws 1895), provided for a territorial board of equalization, and that:

"It shall be the duty of said board to examine the various county assessments and to *equalize* the same, and to decide upon the rate of territorial tax to be levied for the current year, together with any other general or special territorial taxes required by law to be levied, and to equalize the levy of such taxes throughout the territory. And shall therefrom find the percentage that must be added to or deducted from the assessed value of each county, and shall then order the percentage so found to be added to or subtracted from the assessed values of each of the various counties of the territory, and shall notify the various county

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clerks of the percentage so ordered to be added to or subtracted from the valuation of property in their respective counties.”

Under the foregoing Organic Act and statute, the territorial board of equalization undertook to and did raise the total assessed valuation of the property of the territory; and it was held by the Supreme Court of the territory, in the case of *Gray et al. v. Stiles, Treasurer, et al.*, 6 Okla. 455, 49 Pac. 1083, decided September 2, 1897, that under the power given to the said board its sole legal duty was, the aggregate amount of property having been ascertained by the abstract of assessment rolls furnished to the auditor of the territory from the various counties, an ascertainment of the proper percentage which should be added to some counties and taken away from others, in order to place the counties upon an equal footing—the aggregate amount of property remaining the same, except from such slight raising or lowering of the amounts as may be incidental to the operation of equalization of the taxes among the various counties. This case covers nearly 100 pages of the report, and is an exhaustive one on the subject, presenting the best discussion of the law, from the standpoint of the appellant, that is presented in any of the cases. This opinion was prepared for the court by Justice McAtee, who dissented from the previous opinion involving the same question (*Wallace et al. v. Bullen et al.*, 6 Okla. 17, 52 Pac. 954, decided July 17, 1896), in which case it was held:

“The statute creating the territorial board of equalization conferred upon the board authority to review and correct the valuations of property for taxation returned to them by the county clerks of the several counties of the territory, and to equalize such valuation upon the basis of the true cash value of the property, and may lawfully increase the aggregate valuation of property in the several counties of the territory, as returned by the clerks of the several counties.”

The petition for rehearing, which was filed to this latter opinion was not decided until June 25, 1898, and in the opinion prepared thereon by Chief Justice Burford, 6 Okla. 757, 54 Pac. 974, the case of *Gray et al. v. Stiles, Treasurer, et al.*, *supra*, was specifically overruled, and the doctrine of the case of *Wallace et al. v. Bullen et al.*, *supra*, adhered to. So it will be seen that the

proposition received exhaustive consideration at the hands of that court. While the doctrine finally adopted by the court did not meet with the unanimous concurrence of all of the Justices thereof, there were but three out of nine who considered it who did not concur therein. The same question was again before that court in the case of *Bardrick et al. v. Dillon et al.*, 7 Okla. 535, 54 Pac. 785. That case involved the duties of the county board of equalization. The statute relating thereto provided that after the returns were made from all the townships, the board of county commissioners should hold a session, at a fixed time, for the purpose of *equalizing* the assessment rolls in their county between the *several* townships. St. Okla. 1893, c. 70, art. 6, sec. 2. The language of this statute is notably similar in its phraseology to the language of the Constitution empowering the State Board of Equalization to "equalize the valuation of real and personal property of the several counties in the state." Section 21 of article 10 of the Constitution (section 286, Williams' Ann. Const. Okla.). In defining the meaning of the word "equalize" as there used, and of the authority of the board so empowered, Chief Justice Burford, who prepared the opinion for the court, said:

"This statute prescribes the power of the county board, but makes no provision as to the manner or method in which it shall perform that duty or execute the power; nor does it place any limitation on its power. The board is simply empowered to equalize the various township rolls. Now, what does this word 'equalize' mean? It has no technical or scientific meaning. It is a word used in every-day parlance, and is here used in its common and ordinary sense and acceptation. The purpose of having equalizing boards is that all classes of property, all parts of the taxing district, and all persons owning taxable property may bear equal burdens, and to secure equality, as near as may be, under a general law. In Webster's International Dictionary 'equalize' is defined: 'To make equal; to cause to correspond, or be like, in amount or degree as compared; as, to equalize accounts, burdens, or taxes.' The Century Dictionary and Cyclopedia gives this definition: 'To make equal; cause to be equal in amount or degree as compared; as, to equalize accounts, to equalize burdens of taxes.' The word 'equalize' is not found in the law dictionaries of either Bouvier or Black, but Black defines 'equality' (which is the end to be reached by equalizing) as 'likeness in possessing the same rights, privileges, and immunities, and being liable to the

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same duties.' There is nothing in the etymology, origin, or derivation of the word 'equalize' that signifies any such meaning as that contended for by plaintiffs in error; and no lexicologist, philologist, or law writer has ever attempted to impute such meaning to the word. It is the duty of the county board of equalization to examine the tax assessment rolls from all the townships in the county, and cause such assessments to be so adjusted and equalized that the property in each township will bear its equal and just burden of the taxes to be levied upon such assessments, and so that all the taxable property in the county will pay its equal proportion of the public revenues. This power is given the board, and duty imposed upon it by the revenue laws. The statute points out no manner in which this power is to be executed and duty performed; and there is no limitation upon the manner in which the equalization shall be done, except that property shall not be valued above its true cash value. Our statute contemplates that all taxable property shall be valued, for purposes of taxation, at its fair cash value; and all assessing officers and equalizing boards are bound, when performing the duties imposed on them, to keep this fact in view, and not fix such values or make such additions for purposes of equalization as will increase property beyond its fair cash value."

The act of 1895, *supra*, was amended by the territorial Legislature in its act of February 24, 1899 (Sess. Laws 1899, art. 3, c. 28, sec. 1), as follows:

"That the said board of equalization is hereby expressly forbidden to raise or lower the aggregate grand total of the valuations of the taxable property of said territory as returned by the several county boards of equalization."

It is contended that this section of the act was extended to and continued in force in the state of Oklahoma by virtue of the provisions of section 2 of the Schedule to the Constitution. The Attorney General, however, takes the position that the said section was not a valid law of the territory of Oklahoma, for the reason that it was in conflict with section 6 of the Organic Act, which provided that "all property subject to taxation shall be taxed in proportion to its value," and that the territorial Legislature lacked the power or authority to restrain the taxing officers of the territory in any manner, so that in the performance of their duties they might be precluded from placing upon the property returned a valuation approximating its fair cash value;

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and, even if this were not true, that it was repugnant to section 21 of article 10 of the Constitution, which provided for a State Board of Equalization, and made it its duty to adjust and equalize the valuation of real and personal property of the several counties of the state. For the purposes of this case, however, it is not necessary for us to determine whether the section was in conflict with the Organic Act of the territory, or repugnant to the Constitution, for the reason that the state Legislature, on March 10, 1909, by section 1 of article 7, c. 38, Sess. Laws 1909 (section 7620, Comp. Laws 1909), provided that:

"The Governor, State Auditor, State Treasurer, Secretary of State, Attorney General, State Examiner and Inspector, and president of the Board of Agriculture, shall constitute the State Board of Equalization, and said State Board of Equalization shall hold a session at the capital of the state commencing on the third Monday in June of each year. It shall be the duty of said board to examine the various county assessments and to equalize, correct and adjust the same as between the counties by increasing or decreasing the aggregate assessed value of the property or any class thereof, in any or all of them, to conform to the fair cash value thereof as herein defined, and to order and direct the assessment rolls of any county in this state to be so corrected as to adjust and equalize the valuation of the real and personal property of the several counties of this state."

This act, which was passed prior to the action of the State Board of Equalization of which complaint is here made, is in direct and flat conflict with the section in question. It is to be noted that the said board is therein empowered to increase or decrease "the aggregate assessed value of the property or any class thereof, in any [county] or all of them." This being the latest expression of the legislative will, and being in conflict with the previous one, must prevail. The reading of this act in the light of the previous adjudications in this jurisdiction of the power possessed by the equalizing boards where given authority to equalize leaves nothing less to be gathered from it than a specific present intention on the part of the Legislature to preclude and exclude any such limitation as insisted upon. For clearly, under the authority granted by vesting equalizing power in boards, as the same had been defined in this jurisdiction, no specific grant

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was required at the hands of the Legislature to authorize the board to increase the aggregate valuation; for the courts had finally decided that this authority existed by virtue of the power to equalize, where the cash value was the standard. Herein is the certain effort of the state Legislature to restore the law as it was before the act of February 24, 1899, was passed. That law provided that the aggregate value should not be raised; while this law specifically provides that it may be, just as the courts had previously held was permissible under the language used.

In this connection, also, consideration may be given to the argument made by counsel that, in order to equalize, it was the duty of the board to take some particular county in the state, whose valuations appeared to be approximately intermediate, and then reduce the valuations of all the counties which were in excess of that, and raise the valuations of all the counties which were less, to that standard. In other words, counsel's contention is that the valuation of some particular county should be taken as the standard, and that to take any other standard was inequitable and unjust. This argument might have had great weight with the framers of the act; but it falls when made to a court called upon to construe it. The Constitution provides (section 8 of article 10; section 273, Williams' Ann. Const. Okla.) that "all property * * * shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale." And section 1 of article 7, c. 38, Sess. Laws 1909 (section 7620, Comp. Laws 1909), makes it the duty of the said Board of Equalization to so equalize the property of the different counties by increasing or decreasing the assessed value thereof "to conform to the fair cash value thereof." This fair cash value is the standard fixed by the Constitution and the Legislature, and not some particular county's valuation. Herein is just the distinction which exists between this case and the case of *People ex rel. Crawford v. Lothrop*, 3 Colo. 428, at page 462, which counsel press so strenuously upon our attention. The constitutional provision of Colorado had the same phraseology in reference to the State Board of Equalization, to wit, that its powers were to adjust and equalize, but the standard for equal-

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izing purposes was not fixed thereby; and it is to be noted that the authority given in the general laws there quoted (section 42, p. 766) was to "examine the various assessments as far as regards the state tax, and equalize the rate of assessments in the various counties whenever they are satisfied that the scale of valuation has not been adjusted with reasonable *uniformity* by the different assessors." This is followed by section 43 of the act, which then provided that the board should ascertain whether the "valuation of real estate in each county bears a *fair relation or proportion to the valuation of all other counties of the state*, and on such examination they may increase or diminish the aggregate valuation of real estate in any county as much as in their judgment may be necessary to *produce a just relation between all the valuations of real estate* in the state, but in no instance shall they reduce the aggregate valuation of all the counties below the aggregate valuation as returned by the clerks of the several counties." Under this authority the State Board of Equalization assumed to increase the aggregate valuation of all of the property in the state; and the court, in our judgment, under these statutes, correctly held that such power was not vested in the board. It will be noted that the specific distinction between that case and the one at bar is that in Colorado the standard was the valuation of the counties of the state as returned to the board, while in Oklahoma there is but one standard, which is the one fixed by the Constitution and statute, to wit, the fair cash value of the property, and this must necessarily be without reference to whether this has been attained by one county or all of them or none of them. If the valuation as returned to the State Board of Equalization is in excess of the fair cash value of the property in the state, it is the duty of the board to lower it; and if the valuation is less than this it is its plain duty to raise it. This, to us, seems the end of the entire matter.

The duty of the State Board of Equalization of the state of Utah was to "adjust and equalize the valuation of the real and personal property among the several counties of the state," being virtually the same as here. The power vested in the State Board of Equalization under this language was, by Chief Justice Zane,

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in the case of *Salt Lake City v. Armstrong*, 15 Utah, 473, 49 Pac. 641, stated to be as follows:

"The last section makes it the duty of the county board to adjust and equalize the valuation of the real and personal property within their respective counties, without prescribing the mode to be adopted. This leaves the board the discretion to adopt any reasonable and just method; and if, upon an examination and investigation of the assessment, the board should be of the opinion that the real estate in a particular locality is too high, and that in other localities the assessment is too low, it would appear to be a reasonable exercise of its authority to prescribe the localities, and raise or lower the valuation, so as to equalize the assessment in such districts. * * * It has the right to determine the value of property, and, if necessary for the purpose of equalization, may raise the valuation of one district, and lower that of another, even though by such action the total valuation of the property of the county may be increased or decreased. *State ex rel. v. Thomas et al.*, 16 Utah, 86 [50 Pac. 615]."

This same language occurs in the statutes of Missouri, and the word "adjust" is construed in the case of *Washington County v. St. Louis & Iron Mountain R. Co.*, 58 Mo. 372, 376, to mean that if the reported estimate is too high or too low "it must be 'adjusted,' which, according to the received definition, means 'fitted,' 'made accurate.' The exact relation which the property bears to a money standard must be so fixed."

And as a finality, as was said by Chief Justice Burford, in the case of *Wallace et al. v. Bullen et al.*, 6 Okla. 17, 52 Pac. 954:

"The general scope of the jurisdiction and powers of the taxing authorities is to impose taxation upon property assessed at its true cash value, and at a rate not exceeding the maximum fixed by law; and when the authorities have proceeded and acted within the scope of their authority as thus defined, and property has not been valued for taxation beyond its true cash value, or a greater rate of taxation levied upon such value than that authorized by law, the owner has not been injured and cannot be heard to complain, provided his property has been taxed equally and uniformly with other property in the taxing district."

The limits expressed therein are the limits fixed by the Constitution. Every taxpayer is entitled to have his property assessed equally and uniformly with the property of every other taxpayer. If his property is taxed at its fair cash value estimated at the price

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it would bring at a fair voluntary sale, and the property of all other taxpayers is so assessed, then the uniformity sought by law has been attained; but if his property is assessed at less than this, and the balance of the property conforms thereto, then an injustice has been done the balance of the taxpayers and the state. This limit upon the assessment is the one provided for in the Constitution, as is also the limit of the levy which may be assessed. Section 9 of article 10, Constitution (sec. 137, Williams' Ann. Const. Okla.). Beyond the limit of fair cash value and the limit as to the rate of levy the taxing authorities of the state cannot go; and wherever they seek to do so the law has provided every taxpayer a remedy by appeal, as provided in chapter 87, p. 173, Sess. Laws 1910.

The question considered and decided above is the only question which is presented and argued by the parties to this cause. In the brief of the *amici curiae*, however, other propositions are raised and presented, and by reason of the public importance of the question and the fact that the case presents an appeal from the action of the State Board of Equalization, and it is tried *de novo* upon the same questions as were there presented, we have considered and will decide the objections raised.

In addition to insisting that the contentions of counsel for appellant are correct, it is contended that the act of the Legislature (section 7620, *supra*) is unconstitutional, in that it adds to the power and authority granted the State Board of Equalization by the Constitution the authority of "increasing or decreasing the aggregate assessed value of the property, or any class thereof, in any or all of them [the counties] to conform to the fair cash value thereof," because the Constitution and statute of the state recognize but two classes of property, real and personal; and that the State Board of Equalization, in its process of equalizing, is limited to a consideration of the total value of the property of a county as a unit, or that it is limited to a consideration of real property as one class, and personal property as another; and that these could not lawfully be divided into classes, for the purpose of adjusting, equalizing or correcting the value thereof. It is true that under section 7205, Comp. Laws 1909,

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property is classified as either real or immovable, or personal or movable. This is in a chapter of the statutes which relates to property generally, and refers to the ownership thereof, including many of the rights growing out of the same. The subject which we are discussing relates to taxation and revenue.

Section 7562, Comp. Laws 1909, provides that on or before the 1st day of January of each year the State Board of Equalization shall provide, for the use of the local assessors, suitable blank forms for listing and assessing all property, and then sets forth all of the different classes into which this property is to be divided for such purposes. For instance, under section 2, the list of taxable property assessed to each person shall, as to his lands, be described by township, range and section, or by lots and blocks, if in a city or town; and personal property is divided into more than 25 classes, under which there is required to be listed in one class the number of horses, in another the number of mules and asses, and, again, the number of cattle over six months old, also the number of sheep and goats over three months old, also sewing machines, in another watches and clocks, also the number of pianos, organs, and other musical instruments. Office furniture constitutes another, and the value of agricultural tools, implements, and machinery yet another, and so on through the entire list of property which may be owned or within the control of any person, and subject to taxation. In addition thereto, as showing the complete control vested in the boards of equalization, state and county, over the different classes, and showing that these may be varied and changed every year at their discretion, it is provided "that the above list may be extended at the discretion of the State Board of Equalization or board of county commissioners, so as to obtain such facts as they may deem advisable."

In addition thereto, and as disclosing in a measure the intention of the Legislature in passing the act containing the language to which the attack is directed, section 7563, Comp. Laws 1909, provides for a demand by the assessor of a statement, under oath, of the persons whose duty it is to assess such property, and fixes as his duty that he "shall set out in such sworn statement an itemized account of all classes of property, subject by

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law to assessment, by him so held or controlled." Further on in the same section it provides that on a refusal to so list the assessor shall estimate the "number, amount and cash value of all the several species of property required." And section 7566, *Id.*, again uses the following language: "And the assessor shall seek to have assessed the same classes of property at a uniform value throughout the county." Section 7559, *Id.*, provides for the making up of the assessment roll, and again refers to the property included therein as "the several species" thereof. Herein it is noted that the division of taxable property in the scheme of legislation relating thereto is not confined to simply the two grand divisions defined as real and personal. Two entirely different subjects of legislation were being considered on the different occasions, and it would be manifestly improper, in our judgment, to limit the classification contained in one to that of the other.

Nor can we be unmindful of the language of the act. The power to equalize, correct, and adjust was *not* by increasing or decreasing the aggregate assessed value of the property, or *either* class thereof, but was of *any* class thereof, indicating manifestly that it was not intended to restrict the classification to just real and personal property. A definition of the word "any," as given by Webster's New International Dictionary, is, "One indifferently out of a number," and, with reference to whether more than two was intended, it is explained:

"As applied to individuals, 'any' was formerly (and in dialect English is still) used pronominally for one of two, but in educated usage *any* and *any one* are now applied only to one of three or more, *either* and *neither* being used in referring to one of two."

But it is contended that the authority of the Legislature to prescribe other duties for the State Board of Equalization, as provided for in the Constitution, did not extend to the point of authorizing it to equalize the valuations between any of the classes of either real or personal property, because therein it is provided that the duties of the board shall be "to adjust and equalize the valuation of real and personal property." And it is contended that this language constitutes a limitation upon the au-

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thority of the Legislature to further extend the power of the board. The language of the section (section 286 [section 21, art. 9], Williams' Ann. Const. Okla.), so far as pertinent hereto, is as follows:

"The duty of said board shall be to adjust and equalize the valuation of real and personal property of the several counties in the state, and it shall perform such other duties as may be prescribed by law."

The duty of the board is, as we have seen, to equalize, with the fair cash value of the property for its standard. This is its only limitation, and thereunder to attain this it had authority to divide the property of the state, real and personal, into different classes for the purposes of taxation. This must be so, for it was simply a method laid down by law for the guidance of the taxing officers, or, in other words, it was prescribing by law other duties for the board to perform; and in either event we have no doubt that the Legislature had the full authority to prescribe the same. We have been cited to no authority which would deny it, and we know of none. Therefore we hold the Legislature had the power to enact this law extending the duties of the board in question to the equalization of the different classes into which the property of the state was divided for assessing purposes.

We have had our attention called, in this connection, to the case of *State v. Thomas*, 16 Utah, 86, 50 Pac. 615, but, in our judgment, it touches the question only incidentally. Section 2 of article 13 of the Constitution of Utah provides:

"All property in the state, not exempt under the laws of the United States, or under this Constitution, shall be taxed in proportion to its value, to be ascertained as provided by law."

An act of the Legislature provided that:

"When, after a general investigation by the board, the property is found to be assessed above or below its full cash value, the board may, without notice, so determine, and must add to or deduct from the valuation of: (1) the real estate; (2) improvements on such real estate; (3) the personal property, except money, such per centum respectively as is sufficient to raise or reduce it to its full cash value."

Dealing with this alleged conflict, the court said:

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"It is contended by one of counsel for the defendant board that this section is in excess of constitutional authority, and therefore void; and reference is made to the provision of section 2 of the Constitution, hereinbefore considered, as the one with which it is in conflict. We are unable to see in what respect section 83 is in conflict with that provision of the Constitution which we have construed in connection with section 3 of that instrument, as providing for the assessment of all taxable property at its full cash value. Section 83 provides likewise. The Constitution is silent as to the classification of taxable property for the purposes of taxation. Section 83 provides for such classification, and how the valuation may be increased or reduced. This was a proper exercise of legislative power, in the absence of any constitutional limitation; and the section is valid, notwithstanding that it excepts money from its operation. That exception does not invalidate the statute, because, in respect to taxation, money is the constitutional standard of all values. The valuation of all property shall be 'according to its value in money' is the mandate of the fundamental law."

Also, our attention has been called to the case of *State ex rel. v. Vaile*, 122 Mo. 33, 26 S. W. 672, wherein the State Board of Equalization, by order, provided that in Jackson county the valuation of lands should be reduced 25 per cent. and town lots 50 per cent. This it was held to be without power to do, for the reason that section 7514, Revised Statutes 1889, provided that the board shall equalize the valuation of the property "among the respective counties in the following manner, to wit: First, they shall add to the valuation of the property, real or personal, in each county, which they believe is valued below its true value in money, such per centum in each case as will raise it to its true value; second, they shall deduct from the valuation of the property, real or personal, of each county which they believe to be valued above its real value in money, such per centum as will reduce the same in each case to its true value." It is to be observed that this statute is dissimilar to the statute under consideration in this case, for the reason that the duty of the board is specifically limited to raising or lowering either real property or personal property, and that there was not vested in it the authority to raise or lower the classes of either real or personal property, which power is specifically conferred upon the State

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Board of Equalization by the statute in question. Discussing this statute, the Supreme Court of Missouri says:

"The meaning of this statute, it seems to us, is clear. It gives the board power to equalize the value of property, real or personal, among the counties; but it gives that board no power to go into any county and equalize the value of parcels or *classes* of real estate therein. That is a matter confided by the law to the county board of equalization. The powers of the two boards are entirely different. The state board deals with the entire county assessment on real as on personal property, while the county board deals with individual assessments. The state board may, no doubt, raise or decrease by a uniform per centum the valuation on all lands in a county, without changing the valuation on personal property, or it may raise or decrease by a uniform per centum the valuation of all personal property in a county, without disturbing the valuation of real property; but it has nothing to do with adjusting the values of different parcels of land in the same county. Inequalities between parcels of land or *classes* of land in the same county are matters within the exclusive jurisdiction of the county board. The state board has nothing to do with them."

Just the power as to classes of property which the State Board of Equalization lacked in Missouri has been specifically conferred upon the State Board of Equalization of this state. The Missouri board found on an investigation that the lands of Jackson county had been assessed at 25 per cent. in excess of the amount which they should have been assessed, and that the town lots had been assessed 50 per cent. in excess of that amount, but it lacked the power to equalize and equitably adjust this difference. Therefore its action in endeavoring to do this was held void. The consequence was an injustice or inequality and lack of uniformity in the taxation of this property. This was just the situation and defect which would exist in our law, except for the act here inveighed against; and it was to correct the manifest certainty of inequality inherent in the administration of such a system that the Legislature of the state wisely provided and invested the state board with the power to equalize between the valuation of classes of property, where the same was unequal. For instance, if the board should discover that in some county of this state the value of farm lands was placed at their fair

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cash value, and that the town lots had been assessed at but one-half of their fair cash value, it has the power without disturbing the farm values, to raise the valuation of the town lots, and thus bring about uniformity in the burden of taxation between the owners of these two classes of property. If the contentions of counsel were to be sustained, it would be necessary, in order to impose a just proportion of the burden of taxation upon the owners of town lots by increasing them to their fair cash value, to, at the same time, increase the valuation of farm lands 50 per cent. above their fair cash value. It can be seen at a glance that a system which would require this would be an iniquity, which should not be permitted to continue. So it is with the equalization between classes of personal property. Under previous practice, and under the one which obtained in Missouri, in order to raise the valuation of any particular classes of personal property, so that their owners might pay their just proportion of taxes, it was necessary to raise the valuation of all classes of personal property. The result was that in every instance where money or credits were assessed, in order to raise the valuations of other personal property to a proper basis, and this was done, their owners were driven to the courts for relief, or compelled to suffer an unjust extortion. The operation of such a system was particularly severe upon the small taxpayer, for the reason that in virtually every instance the burden of litigating for his rights was heavier than the one which he bore in suffering himself to be the victim of an unjust assessment. As we view it, the Legislature of this state sought to correct just the evils which existed in the old system, and under the scheme here worked out there has been brought about a better and a more uniform assessment and more equitable distribution of the burdens of taxation among the people who must bear them.

Nor does this action on the part of the State Board of Equalization result in a new assessment of property. If a board of equalization is powerless to fix a different valuation upon the property than that returned to it, then it would be without power to accomplish equalization, because, in order to equalize in Oklahoma, it is necessary that the power exist to fix a valuation on the

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property returned at its fair cash value. And where this is done by the State Board of Equalization, and its valuation exceeds this sum, the taxpayer has a full, specific, and definite remedy; and it is worthy of note that no point is made that the equalization of which complaint is here made has resulted in raising the property above its fair cash value. Necessarily in Oklahoma, as in every other state, an exact and equal distribution of the burden of taxation is not effected. It has never been since government was instituted, and probably never will be. There will never come a time when some of the taxpayers do not pay more than they should, and when others do not pay less. As was said by Justice Field, in *Stanley v. County of Albany*, 121 U. S. 535, 7 Sup Ct. 1234, 30 L. Ed. 1000:

“Absolute equality and uniformity are seldom, if ever, attainable. The diversity of human judgment, and the uncertainty attending all human evidence, preclude the possibility of this attainment. Intelligent men differ as to the value of even the most common objects before them—of animals, of houses and lands in constant use. The most that can be expected from wise legislation is an approximation of this desirable end; and the requirement of equality and uniformity found in the Constitutions of some states is complied with when designed and manifest departures from the rules are avoided.”

But the system which enables a State Board of Equalization to distinguish between classes of property, some of which have been assessed too high, and others of which have been assessed too low, and bring them all to a common standard, is an advanced step over the system which previously existed in this jurisdiction, and which exists in a number of states. That it has not and will not make mistakes is not assumed nor claimed; no one expects this; but that its errors will be less in degree and number than they would be if it lacked this power every one must concede.

The strictures indulged in by counsel do not, for the most part, reach the question of the constitutionality of the law, but it is contended that it will work inequitably; that it is cumbersome; and that the state board cannot know the correct valuation to be placed upon property as well as the local assessors and

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boards. All of this may be true, but it is the method which has been provided by the Legislature; and that department of government, and not this, has the power to change it. Until it does, it is our duty to declare it as it is written. We are forbidden to declare a law unconstitutional simply for the reason that we do not agree with its policy. The Legislature of this state has said in its solemn enactment that the State Board of Equalization is invested with just the authority and power we have here sustained, to wit, that it may increase or decrease the aggregate assessed value of the property, or any class thereof, in any or all the counties, to conform to the fair cash value thereof; and that the Legislature possessed the constitutional authority to so vest the board, we entertain no doubt whatever.

We therefore say, as our judgment herein, the valid authority of the State Board of Equalization extended to the point, wherein in its judgment the situation justified it, of increasing or decreasing the aggregate valuation of property of the state as returned to the Auditor and to it by the different county clerks of the state, and that the Legislature had full power to pass the section of the act of March 10, 1909 (section 7620, Comp. Laws 1909; article 7 of chapter 38, p. 599, Sess. Laws 1909), and that under and by virtue of the terms thereof the State Board of Equalization was authorized to raise or reduce the values of the different classes of property as the same were designated in the laws relating to taxation, and that, as its acts are not otherwise assailed, the action of the board must be and is affirmed.

HAYES and KANE, JJ., concur; TURNER, C. J., and WILLIAMS, J., dissent.

Kelley v. Reynolds.

KELLEY v. REYNOLDS.

No. 3592. Opinion Filed November 16, 1912.

(128 Pac. 116.)

TRIAL—Evidence—Directing Verdict. Where plaintiff brings action to recover possession of certain real estate on the theory that the same is the homestead of himself and family, but on the trial thereof offers no proof to sustain such claim, it is not error for the trial court to direct a verdict against him.

(Syllabus by the Court.)

*Error from Tulsa County Court;
N. J. Gubser, Judge.*

Action by Wesley Kelley against E. Reynolds. Judgment for defendant before a justice was appealed to the county court, and on denial of a motion for a new trial, plaintiff brings error. Affirmed.

Francis R. Brennan, for plaintiff in error.

Roach & Bradley, for defendant in error.

DUNN, J. This case presents error from the county court of Tulsa county, and was originally brought as an action of unlawful detainer before a justice of the peace, from whose judgment appeal was taken to the county court of the said county, and after trial there had, and denial of motion for new trial, the same has been lodged in this court for review.

The action was brought by plaintiff in error as plaintiff, who is the surviving husband of Susannah Kelley, a deceased Creek Indian, and is to recover possession of 60 acres of land originally a portion of the said Susannah Kelley's surplus allotment. October 12, 1908, she executed an agricultural lease in writing to the defendant, leasing the land herein involved, and an additional 40 acres situated in a different section, for a term of five years, ending December 31, 1913. The defendant claims possession of the 60 acres under this lease. The plaintiff's action is

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predicated upon the theory that the said 60 acres was a part of the homestead of the Kelley family, and that, upon the death of Susannah Kelley, the plaintiff, her husband, became entitled to occupy it under the homestead laws of Oklahoma. There was no evidence that Susannah Kelley, or plaintiff, or their family, ever at any time selected as a homestead or occupied the 60-acre tract, nor that it was used in any way whatsoever in connection with the 80 acres which was occupied as the homestead of the family; nor did plaintiff appear at or testify on the trial, nor did any one else, that he had selected or claimed the same as a part of the family homestead. Under these circumstances, at the conclusion of the evidence, the court instructed the jury to return a verdict for the defendant, which was accordingly done, and judgment dismissing plaintiff's cause entered thereon.

The case of plaintiff failed through a lack of proof. The presumption obtains that the lease was valid, and that the party in whose name the land stood, and who had possession, had a right to lease it, and in the absence of proof of plaintiff's superior right, on some ground, defendant was entitled to recover, and the judgment, under the record, must be affirmed.

All the Justices concur.

DUNN et al. v. DISTRICT COURT OF CARTER COUNTY.

No. 3958. Opinion Filed November 16, 1912.

(128 Pac. 114.)

VENUE—Transitory Actions. Where an action is brought to recover damages occasioned by an alleged conspiracy on the part of defendants to deny plaintiffs the right to use certain land for pasture for cattle, and no judgment or relief is asked as to the real estate, the same involves damages to personal property, and is therefore transitory.

(Syllabus by the Court.)

Application for Writ of Prohibition.

Petition of T. H. Dunn, Robt. Gilliam, John Washington, and J. A. Chapman, for writ of prohibition to the District Court

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of Carter County, presided over by Stilwell H. Russell, Judge. Writ denied.

W. B. Johnson and L. S. Dolman, for petitioners.

Cruce, Cruce & Bleakmore and Kendrick, Davis & Smith, for respondent.

DUNN, J. May 11, 1912, there was filed in this court by petitioners a petition for a writ of prohibition to be directed to the district court of Carter county, Hon. Stilwell H. Russell, judge, prohibiting said court from proceeding with the trial of an action therein pending, wherein Elizabeth Nail and Hugh Rogers, as plaintiffs, had sued T. H. Dunn and others, as defendants; the contention here being that the venue of the action lay in Murray county, and that the district court of Carter county was without jurisdiction.

The petition in the lower court alleges, among other things, that plaintiffs are, and for a long time prior to the filing of the action had been, in the quiet, lawful, exclusive, and peaceable possession of certain described lands located in Murray county; that they were inclosed with a good wire fence, and are almost wholly suitable for grazing, and not suited for agricultural purposes; that the plaintiffs had been using the same for such purpose, and during the year 1909 had pastured thereon about 2,000 head of cattle, which, in the months of June, July, and August, they shipped to the market; that after shipping the same, and on or about the 1st day of October, 1909, they purchased about 2,000 head of cattle, for the purpose of grazing and feeding them on the said pasture, and that, except for the acts of the defendants, they would have placed said cattle therein, and that, had they not been denied the right claimed, the said cattle would have made a profit to them of \$16 per head, or an aggregate advance of \$32,000; that the defendants above named, on or about the 1st day of October, 1909, conspired together to prevent plaintiffs from occupying said pasture by taking possession thereof, and by force and arms drove plaintiffs and their servants from the same; that if they had not been prevented by the defendants from grazing cattle upon the pasture they could and would have realized

the further sum of at least \$30,000; and that by reason of said trespass the said defendants are still preventing plaintiffs from pasturing the said cattle on the property.

The action brought in this court is predicated upon the proposition that under the provisions of section 5580, Comp. Laws 1909, the same was cognizable only by the district court of Murray county, wherein the land lay. Said section reads as follows:

"Actions for the following causes must be brought in the county in which the subject of the action is situated, except as provided in section 5581 [which is not pertinent hereto]: 1st, For the recovery of real property, or of any estate or interest therein, or the determination in any form of any such right or interest. 2nd, For the partition of real property. 3rd, For the sale of real property under a mortgage, lien or other incumbrance or charge. 4th, To quiet title, to establish trust in, remove a cloud on, set aside a conveyance of, or to enforce or set aside an agreement to convey real property."

Plaintiffs in this court rely for recovery upon the first clause of the said paragraph, and insist that this action is for the recovery of real property, or some estate or interest therein, or for the determination of some right or interest. We are not able to so view it. The action sounds in tort, and relates, not to damages or injury to or the recovery of any interest in and to the real property, but for damages or injury by reason of wrongful acts of defendants resulting to the cattle of plaintiffs. No prayer is made for the recovery of real estate, or any interest therein, nor for the determination in any form of any right or interest the plaintiffs or defendants may claim in and to any real estate. The rule seems to be as stated in 40 Cyc. 69, as follows:

"Where the subject-matter of the suit, although having relation to land, is, in legal effect, and as concerns the aim of the suit at bar, personal property, rather than real estate, the venue is not restricted to the location of the land."

The doctrine is well stated in *Mason v. Warner et al.*, 31 Mo. 508; the court in that case, in the syllabus, saying that "injuries to persons and personal property are transitory, not local." In the discussion of the case, Dryden, J., says:

"Actions are either transitory or local. They are said to be transitory where the transactions on which they are founded

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might have taken place anywhere, but are local where their cause is in its nature necessarily local. [*Livingston v. Jefferson*] 1 Brock. 209 [Fed. Cas. No. 8,411]. The distinction exists in the nature of the subject of the injury complained of, and not in the means by which, or the place at which, the injury was effected. My horse or my steamboat, being movable, is the subject of injury as well in one county as another, as well in one state as another; but this cannot be affirmed of my land, which is immovable. If an agister of cattle open a pit in his field, and negligently leave it open, whereby my horse at pasture is permitted to fall into it and is killed, the means and place of injury are local, but the subject of the injury (the horse) is transitory, and capable of injury as well at one place as another. But if my horse trespass upon the agister's field, break the close, and tread down and eat his grass, here the means of injury (the horse) is movable, transitory; but the subject of the injury (the realty) is immovable, local, and therefore is not capable of being injured at any other place. The counsel for the defendant seems not in his brief to have taken this distinction, but to have fallen in the error of making the means of the injury, rather than the nature of the subject of it, the test of whether the action is local or transitory."

The same error into which counsel in that case fell, it seems to us, is the identical one into which counsel in the case at bar have fallen. The cattle of plaintiffs could as well have been the subject of injury in one county as another; and where that is the case the action is transitory, and may be brought wherever service may be had upon the defendants. On the other hand, if injury had been done to the possession or interest of the plaintiffs in the land itself, and action had been brought to recover for this damage or interest in Carter county, then the action of prohibition which plaintiffs have here brought would lie.

Under these circumstances, therefore, the application for the writ is denied.

HAYES and KANE, JJ., concur; TURNER, C. J., and WILLIAMS, J., absent, and not participating.

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GOREE *et al.* v. CAHILL *et al.*

No. 3963. Opinion Filed November 16, 1912.

(128 Pac. 124.)

1. **ELECTIONS—Validity—Place of Holding.** The requirements of the law relative to the place of holding an election are generally held mandatory, and an election conducted at any other than the designated place is void.
2. **SAME—Mandamus.** On a trial of a proceeding brought for the purpose of securing a writ of mandamus to compel a county election board to meet, canvass, and declare the result of an election, it appeared that the polls were not opened at the council house, the regular voting place, but at the residence of one of the candidates, the location of which with reference to the regular voting place was not shown; that no notice was posted at the council house to inform intending voters of the place of holding the election, nor were the polls opened until between 4 and 6 o'clock; and that but thirteen electors of the town, which had five wards, participated therein, on which evidence the district court allowed the writ. **Held** error; the election being void.

(Syllabus by the Court.)

Error from District Court, Okmulgee County;
Wade S. Stanfield, Judge.

Application by S. D. Cahill and others for writ of mandamus to D. G. Goree and others, composing the Okmulgee County Election Board. Judgment for plaintiffs, and defendants bring error. Reversed and remanded, with instructions.

William M. Matthews, Ralph H. Ellison, and Joseph W. Childers, for plaintiffs in error.

James M. Hayes, for defendants in error.

DUNN, J. This case presents error from the district court of Okmulgee county, and is a proceeding in mandamus to compel the plaintiffs in error, composing the county election board of that county, to convene and canvass the returns of an alleged election held in the town of Morris in that county on the 2d day of April, 1912, for the purpose of electing a board of trus-

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tees for the said town. On the final trial before the court a peremptory writ was issued, and, after the denial of a motion for new trial, the cause was lodged in this court for review.

Among the different grounds presented by the election board, plaintiff in error, why the writ should not have issued, is the one that the election was not held at the legally designated voting place, but was held at the residence of Allen Huff, who is one of the candidates and one of the plaintiffs in the action. As in our judgment this ground under the facts is good and will require the reversal and dismissal of the action, it is not essential that the other grounds presented be considered.

Section 1002a, Comp. Laws 1909, provides:

“All elections held in accordance herewith shall be conducted at the regular voting places or polls used within such cities, towns, and villages at general state elections and in cities of the first class the polls shall be opened at six o'clock in the forenoon and kept open continuously until seven o'clock in the afternoon, and in other towns the polls shall be open at eight o'clock in the forenoon, and close at six o'clock in the afternoon.”

From the evidence in the case it appears that there was some controversy as to whether the law required an election to be held in cities, towns, and villages on April 2, 1912. Certain parties filed with the county election board their application to be certified as candidates, but it seems that, on the advice of the county attorney and possibly the Attorney General of the state, it was decided and announced in the newspaper of the village that no election would be held. No election supplies were sent by the board, but on the day in question these plaintiffs, or at least some of them, with nine others of the town, between 4 and 6 o'clock in the afternoon, with no previous proclamation, met and held an election at the residence of one of the said candidates. It appears from the record that the regular place for holding the election in the town was the council house. It is testified, however, that on this day the same was locked. It does not appear that the parties were unable to unlock it, or that any effort was made to do so or to procure its being opened by those in charge of it; nor does it appear that any notice or proclamation of any kind was placed upon the door, nor in its vicinity,

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to inform intending voters or participants in the election that the same was being held elsewhere; nor does the record show that the residence where the election was held was in proximity of the said council house. Morris is an incorporated town divided into five wards, and, while the number of electors residing therein is not shown by the record, the claim is made in one of the briefs that there are 133, and the fact that but thirteen votes were cast at this so-called election affords additional reasons for the conclusion to which we have come in holding that there was in fact no election in the said town. A perusal of the record convinces us that, while the proceeding was in some respects conformable to the provisions of section 7, art. 6, c. 31, p. 345, Sess. Laws 1907-08 (section 3202, Comp. Laws 1909), it was not intended by its participants as a *bona fide* election, but merely to give color to the claim that one had been held.

Without noticing the other grounds on which it is claimed it ought to be held void, it is sufficient for us to say that the holding of this election at a place other than the regular voting place of the village and at a private residence, which is not shown to have been in proximity of the council house, where no proclamation was posted, is sufficient to render it void; the rule being that the requirements of the law relative to the place of holding an election are generally mandatory and an election held at any other than the designated place is void. 15 Cyc. 343; *Johnstone v. Robertson*, 8 Ariz. 361, 76 Pac. 465; *Walker et al. v. Sanford, etc.*, 78 Ga. 165, 1 S. E. 424; *Melvin's Case*, 68 Pa. 333; *State ex rel. Wannemaker v. Alder*, 87 Wis. 554, 58 N. W. 1045; *Williams et al. v. Potter et al.*, 114 Ill. 628, 3 N. E. 729. See, also, annotated case of *Whitcomb v. Chase*, 17 Ann. Cas. 1088 (83 Neb. 360, 119 N. W. 673), where the authorities *pro* and *con* are collated and which contains a very satisfactory discussion of the subject.

The judgment of the trial court is, accordingly, reversed, and the cause is remanded, with instructions to dismiss the same.

All the Justices concur.

May et al. v. Fitzpatrick et al.

MAY *et al.* v. FITZPATRICK *et al.*

No. 2444. Opinion Filed October 8, 1912.

Rehearing Denied November 19, 1912.

(127 Pac. 702.)

1. **APPEAL AND ERROR—Record—Service of Case-Made.** Where a review of the proceedings of the trial court is sought by means of a case-made, it or a copy thereof having been served upon the attorney of one of the parties after the death of such party without any revivor first having been had, such service is a nullity.

(a) Such failure to serve said case-made upon such party will operate to prevent the case-made from being considered in this court, when the judgment sought to be reviewed is a joint judgment and the person upon whom service was not had was a party thereto.

2. **APPEAL AND ERROR—Parties—Bringing in New Parties.** All parties to a joint judgment must be joined in a proceeding in error in this court to review such judgment; either as plaintiffs or defendants in error.

(a) After the expiration of the time for commencing the proceeding in error, a necessary party to the proceeding in error, in order for this court to acquire jurisdiction thereof, may not then be made for the first time in this court.

(Syllabus by the Court.)

*Error from District Court, Grady County;
Frank M. Bailey, Judge.*

Action by James Fitzpatrick and others against Lee May and others. Judgment for plaintiffs, and defendants bring error. Proceeding in error dismissed.

F. E. Riddle, for plaintiffs in error.

Bond & Melton, for defendants in error.

WILLIAMS, J. On January 18, 1910, the defendants in error, James Fitzpatrick, Silas Fitzpatrick, John Fitzpatrick, Jane Johnson, Sam Brooks, Mattie Lawrence, M. J. Horan, guardian of Stella Brooks, Oliver Brooks, and Belle Brooks, minors, and John Fitzpatrick, Emmett Fitzpatrick, and Grace Fitzpatrick, by

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their next friend, Silas Fitzpatrick, with Mary Holmes, as plaintiffs, commenced an action in the district court of Grady county to determine the title to certain real and personal property. Annie May, Lee May, and the Chickasha National Bank, of Chickasha, Okla., were defendants in that action. On October 13, 1910, judgment was entered for the plaintiffs adjudging that Jim Fitzpatrick, Silas Fitzpatrick, Mary Holmes, John Fitzpatrick, Jane Johnson, and the plaintiff in error Lee May were each the owner of an undivided one-ninth interest of the real and personal property involved in said action; that Sam Brooks and Mattie Lawrence were the joint owners of a one-ninth interest, and Oliver Brooks, Stella Brooks, and Belle Brooks were also the joint owners of a one-ninth interest; that John Fitzpatrick, Emmett Fitzpatrick, Robert Fitzpatrick, and Grace Fitzpatrick were the joint owners of a one-ninth interest. The plaintiffs in error, by proceeding in error commenced in this court on May 18, 1911, seek to review this judgment. On December 20, 1910, the said Mary Holmes died, with her husband, William Holmes, and the following children, Silas Holmes, age 24, Elmore Holmes, age 23, Marie Holmes, age 21, Willie M. Holmes, age 19, John R. Holmes, age 14, William P. Holmes, age 11, and Annie J. Holmes, age 7, residing in the city of Chickasha, Okla., surviving her. The defendants in error move to dismiss this appeal for the reason: (1) That no case-made was ever served upon the said Mary Holmes or her proper representative; (2) because the said Mary Holmes is not properly joined as a party to this proceeding.

It appears that no administrator of her said estate has been appointed, nor has any effort been made to revive the proceedings in the lower court. The record discloses that on February 20, 1911, Bond & Melton, as attorneys for the plaintiffs James Fitzpatrick *et al.* (defendants in error), accepted service of the case-made filed in this proceeding. On the 24th day of March (February), 1911, F. E. Riddle, as attorney for Lee May, plaintiff in error, and Bond & Melton, as attorneys for James Fitzpatrick *et al.*, defendants in error, stipulated that the case-made as proposed was true, complete, and correct, and should be settled without further notice, and on February 25th the same was duly

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signed and settled. The plaintiffs in error do not controvert the foregoing statement of facts.

With the death of Mrs. Mary Holmes, the authority of Bond & Melton to act as attorneys in her said case ceased, and any acceptance of service of case-made by them for her was void. *Kilgore v. Yarnell et al.*, 24 Okla. 525, 103 Pac. 698; *St. Louis & S. F. R. Co. v. Nelson*, 31 Okla. 51, 119 Pac. 625. However, it does not seem to be contended by the attorneys for plaintiffs in error that there was any valid service of the case-made, or that Mary Holmes or her legal representatives are parties to this proceeding. *Skillern et al. v. Jameson et al.*, 29 Okla. 84, 116 Pac. 193; *St. Louis & S. F. R. Co. v. Nelson, supra*. The only question essential to be determined is as to whether she or her legal representatives or heirs are necessary parties here.

The rule is well settled that the failure to make all parties to a joint judgment parties to the proceeding in error, either as plaintiffs or defendants, defeats the jurisdiction of this court to review the judgment of the trial court. *Strange et al. v. Crismon*, 22 Okla. 841, 98 Pac. 937; *Hughes v. Rhodes*, 25 Okla. 172, 105 Pac. 650; *Vaught v. Miner's Bank of Joplin*, 27 Okla. 100, 111 Pac. 214; *Trugeon et al. v. Gallamore*, 28 Okla. 73, 117 Pac. 797; *Thompson et al. v. Fulton*, 29 Okla. 700, 119 Pac. 244; *Price et al. v. Covington*, 29 Okla. 854, 119 Pac. 626; *Saunders et al. v. Mullen et al.*, 31 Okla. 19, 119 Pac. 963; *Bullen v. Hudson et al.*, 31 Okla. 818, 124 Pac. 1; *Seton v. Hudson*, 31 Okla. 820, 124 Pac. 1.

Counsel for plaintiff in error by motion asks that "the death of Mary Holmes be noted and stated of record, and, in the event the court deems and holds it necessary, that he be permitted to have the heirs or representatives of Mary Holmes made parties hereto." That is not permissible after the expiration of the time in which the proceeding in error may be commenced in this court. *American National Bank v. Mergenthaler Linotype Co.*, 31 Okla. 533, 122 Pac. 507; *St. Louis & S. F. R. Co. v. Nelson, supra*. But see *Boyes et al. v. Masters et al.*, 28 Okla. 409, 114 Pac. 710, 33 L. R. A. (N. S.) 576.

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The proceeding in error is therefore dismissed.

TURNER, C. J., and KANE and DUNN, JJ., concur;
HAYES, J., not participating.

CRUCE, Governor, et al. v. AMERICAN NAT. BANK et al.

No. 3324. Opinion Filed November 19, 1912.

(128 Pac. 1131.

*Error from District Court, Oklahoma County;
W. R. Taylor, Judge.*

Application by the American National Bank and others for a writ of mandamus to Lee Cruce, Governor, and others. Judgment for plaintiffs, and defendants bring error. Reversed and remanded with directions.

Chas. West, Atty. Gen., and *W. C. Reeves*, Asst. Atty. Gen., for plaintiffs in error.

Flynn, Chambers & Lowe, for defendants in error.

KANE, J. This was an action commenced by the defendants in error, plaintiffs below, against the State Board of Equalization, praying for a peremptory writ of mandamus commanding the said board to assemble and make an additional tax levy, sufficient to pay the deficiency in the expense of the state government for the fiscal year ending June 30, 1911. The writ was issued by the court below, to reverse which action this proceeding in error was commenced. In the meantime the Governor, Secretary of State, and State Treasurer commenced a proceeding in the district court of Oklahoma county for the purpose of refunding the deficiency above mentioned, together with the deficiencies of several fiscal years prior thereto, whereupon further action was suspended pending the disposition of the refunding case. An opinion in that case has been handed down at the present term, and as the relief granted therein fully and adequately meets the purpose of this suit, it will not be necessary to

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issue the writ herein. In the latter case it was held that the remedy invoked by the plaintiffs in this case and the proceedings commenced on behalf of the state are concurrent remedies, and that it is in the sound discretion of the high officers of the state who instituted that proceeding to select the remedy which to them appeared the best calculated to subserve the interests of the state and its taxpaying inhabitants, and at the same time preserve the rights of *bona fide* warrant holders. For the foregoing reasons the peremptory writ is denied, and the cause remanded, with directions to dismiss the proceeding.

All the Justices concur.

In re INITIATIVE PETITION NO. 23, STATE QUESTION
NO. 38.

No. 4289. Opinion Filed October 8, 1912.

Rehearing Denied November 19, 1912.

(127 Pac. 862.)

1. **CONSTITUTIONAL LAW—Amendment of Constitution—Submission to Electors—Appeal From Secretary of State.** The appeal from a decision of the Secretary of State to the Supreme Court under the provisions of chapter 107, Sess. Laws 1910-11, p. 235, is a transference of the proceeding to this court for a trial *de novo*, and it has jurisdiction to hear and determine the same.
2. **SAME.** Under the provisions of chapter 107, Sess. Laws 1910-11, p. 235, an appeal being taken, this court secures jurisdiction of the Secretary of State by virtue of the notice served as provided for therein, and, on finding an initiative or referendum petition sufficient, it may by its own mandate compel said officer to comply with statutory requirements.
3. **SAME—Initiative or Referendum—Evidence.** The names attached to an initiative or referendum petition regularly filed in the office of the Secretary of State, sufficient in number and for the purpose of having the question therein contained submitted at an election, are presumed to be the signatures of legally qualified citizens and electors of the state, and that the post offices and places of residence given therein are correct, and to defeat the submission of said question, the burden is on the one protesting, to produce evidence sufficient to overcome this presumption, and the mere fact that of letters addressed to all the signers of the said petition at post offices given thereon, above ten per cent.

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were returned to the writer undelivered, or that the circulators of the petition in their affidavits attached thereto set forth more than one county as the residence of the signers of some of the different pamphlets, or that they failed or neglected in a number of instances to legibly write or typewrite the names of the signers of the said petitions on the back thereof, will not be held sufficient, in the absence of other proof, to overcome such presumption and establish that the signers of the said petition were not at the time they signed the same citizens and legal voters of the state.

(Syllabus by the Court.)

In the matter of the Initiative Petition No. 23, State Question No. 38. Judgment rendered.

Orville T. Smith, for protestants.

Lewis P. Mosier, for petitioners.

DUNN, J. This case presents an appeal as provided for by chapter 107, p. 235, of Sess. Laws 1910-11. January 26, 1912, there was filed in the office of the Secretary of State Initiative Petition No. 23, State Question No. 38, which sought to submit a proposed constitutional amendment entitled, "A bill entitled an act proposing a new section to the Constitution of the state of Oklahoma, to be in lieu of section 31, art. 6, creating a State Board of Agriculture, providing qualifications and duties of members and the manner of electing same." The petition was circulated and filed in the said office on April 25, 1912, containing 41,454 signatures. On the 4th day of May, 1912, a protest to the said petition was filed by Marl Woodson, and on a hearing had thereon the Secretary of State found that sufficient evidence had been introduced in support of the contentions of the protestant to compel him to sustain the protest and find the petition insufficient. The statute above cited provides that the decision of the Secretary of State on a protest filed to such a petition shall be subject to appeal to the Supreme Court, and that the cause shall have precedence over all others therein. It is made the duty of appellants to serve notice upon the Secretary of State, in writing, of such appeal, and it is the duty of the said Secretary to immediately transmit all papers and documents on file in his office relating to such petition to this court. The appeal has been

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duly had, and the protestant, raising the question of the jurisdiction of this court to entertain the appeal, makes two contentions: First, that the Legislature lacks the power and authority to authorize an appeal to this court from the decision of the Secretary of State on the exercise by him of the administrative or legislative power exercised in hearing and passing upon the issues raised by this protest; and, second, that should it be determined that an appeal in fact does not lie, but that the action in transferring to this court, under the authority given providing for an appeal, is in fact a transfer of the proceedings to this court for a trial *de novo*, then this court is without jurisdiction to entertain it for the reason that it could render no judgment in the case which it could enforce, and the argument is made that judicial power cannot be exercised under such circumstances. Before considering the case on its merits, it is essential, therefore, that we first determine the question of our jurisdiction.

In the case of *In re Petition No. 3*, known as the Woman's Suffrage Petition, 26 Okla. 487, 109 Pac. 732, in the absence of a challenge by either party in this court, it was assumed that an appeal would lie from the action of the Secretary of State, and the court took appellate jurisdiction and rendered judgment upon the errors which were asserted existed in the action of the Secretary. The question, however, was raised in a recent case involving Initiative Petition No. 21, State Question No. 36, commonly known as the Aiken Bill, and without an opinion being written, this court on objection being made to its jurisdiction, considered the matter and came to the conclusion that the proceeding in this court, while denominated by the statute an appeal, was in fact a proceeding *de novo*, and that the petition and protest and other documents were filed here for the purpose of hearing evidence thereon precisely as they were filed in the office of the Secretary of State. The case of *United States v. Ritchie*, 17 How. 525, 15 L. Ed. 236, is cited and seems in point on this question. Therein the Supreme Court of the United States had before it for consideration an appeal from a decree of the District Court of the Northern District of California, involving proceedings taken before certain commissioners appointed to set-

the private land claims in California under the Act of March 3, 1851, 9 St. at L. 631. The commissioners, after hearing proofs in the case before them, ordered the title confirmed in the claimants. Thereafter a transcript of the proceedings before the board with their decision was filed with the clerk of the United States District Court of the Northern District of California. On a hearing had before the said court, the decision of the board of commissioners was confirmed, and the cause was taken on appeal to the Supreme Court of the United States. On the appeal there taken, a motion was made to dismiss the same by reason of the alleged lack of jurisdiction of the District Court to entertain an appeal from the board of commissioners for the reason that the said board was not organized as a court and lacked authority to exercise judicial power, and hence an appeal would not lie from it to the court. Considering this objection, the Supreme Court of the United States said:

"It is also objected that the law prescribing an appeal to the District Court from the decision of the board of commissioners is unconstitutional, as this board, as organized, is not a court under the Constitution, and cannot, therefore, be invested with any of the judicial powers conferred upon the general government. *Am Ins. Co. v. Canter*, 1 Pet. 511 [7 L. Ed. 242]; *Benner v. Porter*, 8 How. 235 [13 L. Ed. 119]; *United States v. Ferreira*, 13 How. 40 [14 L. Ed. 42]. But the answer to the objection is that the suit in the District Court is to be regarded as an original proceeding, the removal of the transcript, papers, and evidence into it from the board of commissioners being but a mode of providing for the institution of the suit in that court. The transfer, it is true, is called an appeal. We must not, however, be misled by a name, but look to the substance and intent of the proceeding. The District Court is not confined to a mere re-examination of the case as heard and decided by the board of commissioners, but hears the case *de novo* upon the papers and testimony which had been used before the board—they being made evidence in the District Court—and also upon such further evidence as either party may see fit to produce."

This case is cited approvingly and followed in a number of later state and federal cases, and, so far as our investigation goes, the doctrine therein announced seems never to have been departed from. We hold, therefore, in accordance therewith, that the

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jurisdiction taken under the so-called appeal by this court is not ~~appellate in its character, but that on the Secretary of State transmitting to the clerk of this court the petition, protest, and papers and documents on file in his office relating thereto, the case was transferred to this court for an original investigation and hearing, and the evidence and proceedings are to be taken *de novo*.~~ This holding on our part is in consonance with the doctrine that, where a statute is susceptible to two reasonable constructions, under one of which it would be constitutional, and the other would render it invalid, it is the duty of the court to give such construction as will sustain, rather than one which will destroy, the statute. *Rakowski v. Wagoner*, 24 Okla. 282, 103 Pac. 632.

On the question as to whether the court could take jurisdiction by reason of the fact that it had before it no party or parties upon whom its judgment could operate, or, in other words, that it lacked the power to enforce any judgment which it might render, it is to be observed that, on an appeal being taken, section 2 of chapter 107, Sess. Laws 1910-11, provides for notice being served on the Secretary of State, who is thus brought into this court and rendered subject to the jurisdiction thereof, and any orders or judgment rendered, involving the performance of any duty on his part, may be enforced against him, and this fills the measure demanded for the exercise of judicial power. In other words, upon holding a petition valid, and upon the remission to the Secretary of State of the papers and documents relating to such petition, it would then, under section 3680, Comp. Laws 1909, be his duty to notify the Governor, in writing, whose duty then is to issue a proclamation setting forth the substance of the measure and the date of the vote thereon. Herein, in accord with the terms and intent of the statute, is afforded a complete remedy and procedure for carrying it out.

This brings us to a consideration of the case on its merits. A vast amount of evidence was taken before the Secretary of State covering a period of time approximately three months. This is presented to us in the form of two bound volumes of record of about 1,800 pages. Accompanying this record are original peti-

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tions, over 2,000 in number, and about 4,500 envelopes which appear to have been sent through the United States mail and returned to the writer. This evidence, counsel for both parties have agreed, shall be introduced, taken, and considered by the court in the determination of the issues. It appears that there were cast at the general election in 1910, for the highest state officer, 247,666 votes. The number of genuine signatures necessary to initiate an amendment to the Constitution based on this vote is 37,150. The petition presented to us contains 41,454 signatures, or 4,304 more than sufficient to initiate the measure if the signatures are genuine and the petition otherwise valid. Counsel for protestants assert that 527 signatures appearing on the petition are by mark or thumb print, 746 names appear more than once, 417 names with no post-office address given, twenty names where the affidavit verifying the same was written on a separate sheet, and twenty names where the affidavit was sworn to in the state of Kansas. The foregoing, it is contended by protestant, are not subject to be counted as valid signatures to the petition because of the defects mentioned. The total thereof amounts to 1,730, which, if this contention on the part of counsel were conceded, would still leave 2,574 names on the petition more than enough to require the submission of the question. So that, if this were the only objection made to the petition, the evidence, giving it the full weight claimed, would be inadequate to destroy the petition. Under these circumstances, therefore, it will not be necessary to consider for any purpose the evidence adduced on these propositions unless the other objections eliminate a sufficient number of names, which, added to these, would make a sum larger than the excess number secured.

This leaves for our consideration the averment and the contention that there were returned to the writer 4,500 undelivered letters, purporting to have been sent to signers of the petition, and 9,120 names which it is claimed did not give, either in the petition or the affidavit, the county of which the signer was a resident, and the contention that there are 5,390 names not verified as required by the statute. If either one of these claims is sustained, and the

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force of the objection made thereunder held good, the petition must fall for want of a sufficient number of qualified signers.

The statute under which the petitions are prepared and which sets forth the form thereof is section 3674, Comp. Laws 1909, and reads as follows: "The form of initiative petition shall be substantially as follows:" Here then follows the form addressed to the Governor of Oklahoma in which the petitioners are required to recite that the undersigned are citizens and legal voters of the state of Oklahoma and of a certain county or city, and that each for himself said that he had personally signed the petition and was a legal voter of the state of Oklahoma and of the said county or city, and that his residence and post-office was correctly written after his name. Then follows the measure to be submitted.

Taking for consideration the three objections in the order which they are given, it is to be observed that it is contended by counsel for protestant that, because 4,500 envelopes addressed to the apparent signers of this petition at the address as given by them were returned to the writer, therefore this should be considered as conclusive evidence without being supplemented in any particular that the parties who signed the petition were not legal voters of the state of Oklahoma, and therefore not qualified as petitioners, and that these names should be deducted from the total number of signatures received; or that the failure of delivery of the letter showed that the address given was wrong, therefore equal to no address, and that for this reason the name should not be counted. To this we cannot agree. We do not hold, however, that the returned envelopes in cases of this character would not in any instance or for any purpose be considered. There is no proof introduced before us to show that the names signed to the petition were forgeries nor that any other fraud of any kind was practiced in securing them. If such had been the case, or had a wholesale number of letters properly addressed to the apparent signers of the petitions to the post-office addresses given thereon been returned, this evidence might then supplement other evidence sufficient to cause such general discredit to be thrown upon the petition as to augment the weight

of proof to be given these returned envelopes. Or if, for instance, a witness should testify concerning a signer of a petition that he lived at a certain post office, and another witness testified that he did not, the fact that a letter properly addressed and sent to him by United States mail was not delivered, but was returned to the writer, might, by a trier of facts, be considered for the purpose of determining on which side lay the preponderance of evidence. In cases such as these, returned envelopes might have weight, but, standing alone, in our judgment they are insufficient to impeach the validity of the signatures to the petition. Qualified signers might in many instances have been from home and failed, or, if at home, neglected to get their mail, or they may have moved away leaving no address—common contingencies well known, and which would all tend to reduce the weight to be accorded these returned envelopes as evidence.

On the proposition presented by the 5,390 names not verified, the statute provides (section 3676, *Id.*):

“Each and every sheet of every such petition containing signatures shall be verified on the back thereof, in substantially the following form, by the person who circulated said sheet of said petition, by his or her affidavit thereon and as a part thereof: State of Oklahoma, County of ———, ss.—, I, ——— being first duly sworn, say: (here shall be legibly written or typewritten the names of the signers of the sheet) signed this sheet of the foregoing petition, and each of them signed his name thereto in my presence; I believe that each has stated his name, post-office address, and residence correctly, and that each signer is a legal voter of the state of Oklahoma and county of ——— or of the city of ——— (as the case may be). (Signature and post-office address of affiant.) Subscribed and sworn to before me this ——— day of ———, A. D. 19—. (Signature and title of officer before whom oath is made, and his post-office address.”

Under the claim made in this case, it is insisted that the different persons who circulated the said petition failed to legibly write or typewrite correctly the names of the signers of the petition, and it is contended that, because of the fact that the names as copied by the circulator of the petition were not copied legibly or did not exactly correspond with the name as it appeared on the face of the petition, therefore such

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signature was invalid. Or, as counsel put it, the said affidavit constitutes the proof of the qualification of the signers of the petition, and their right to be counted as such signers depends upon the accuracy with which the circulator carries out the duties prescribed in the foregoing section. Here, again, under the situation presented by this petition, we are not able to concur with counsel. The petitions on their face show that to a very great extent they have been circulated generally among all classes of people and evidently have been signed by them on the street, in the shop, and at the farm, as well as where writing materials and convenience coincided. Nearly all the pamphlets have been signed with ordinary lead pencils, and, while it may be conceded that, in the instances cited by counsel, the party circulating the petition failed to legibly copy within his affidavit the name as written, this, in the absence of any other proof of disqualification of the signer, in our judgment is not sufficient for us to hold that he was not a legal voter of the state of Oklahoma. The consideration of the balance of this proposition is in a later paragraph and will not be here noted.

The same observation is entirely applicable to the names which it is contended did not give, either in the petition or in the affidavit, the county of which the signer was a resident. This claim arises on the following state of facts: Virtually none, or comparatively few, of the pamphlets contained upon their face, with the names of the signers, the name of any county. Therein was given merely the name and post-office address, and, if a city, the street number of the signer. But in a number of the affidavits of the circulators appear the names of several counties, so that they read that the petitioners had signed their names in the presence of the circulator, and that he believed each had stated his name, post-office address, and residence correctly, and that each signer was a legal voter of the state of Oklahoma, and of the county of ——— and ——— and ———, apparently indicating that the signers were residents of two, and in some instances more than two, counties. The objection which is here sought to be raised is met by the fact that the post-office address given would fix the locality in which any particular signer lived,

so that on investigation he could be located, and that while it is manifestly true that a legal voter of the state of Oklahoma must be such voter in some particular county, yet the mere failure to accurately designate the county in the affidavit of the circulator would not in our judgment serve to establish that the signer was not such legal voter of the state, and this is the substantial thing to be disproven.

In dealing as we have above with the objections which have been urged to this petition, we believe that we are carrying out the policy of this law in the very spirit intended by the people of this state in adopting it. The right of direct legislation in the people must be administered by the officers charged with that duty in such manner as to make it operative. If technical restrictive constructions are placed upon the laws governing the initiation and submission of these measures, the purpose and policy of the people in establishing the same will be entirely defeated, and instead of becoming an effective measure for relief from evils, under which they have heretofore suffered, there will be naught but an empty shell and a continuation of the conditions for which relief in this manner has been sought. The people who circulate a petition to submit for the consideration of their fellow citizens, constitutional and statutory provisions for the most part are unquestionably animated by a purpose which to them and the signers thereof, at least, appears good. Those who circulate the petition will necessarily be drawn from the ranks of volunteers or those who, for a very small consideration, call attention to their fellow citizens to the measure proposed, and solicit their interest therein. Necessarily even with the best safeguards that can be thrown around the circulation of petitions, where such a large number of names are required, inaccuracies and technical departure from prescribed forms are certain to occur every time a petition is circulated. The people who sign the petitions often, if not generally, lack both convenience and the best writing materials to distinctly, legibly, and permanently attach their names thereto. All of these things are proper to be noted and taken in consideration in the administration of this law. It can be made effective or defeated by the officers charged with its administra-

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tion, and it is our duty to sustain it, rather than destroy, if it can be accomplished within the law. The presumption is that petitions which are circulated, signed, and filed are valid. People interested as the circulators of these petitions, and the others who sign them, are acting in the capacity of legislators. They are members of the largest legislative body in the state, and, where so acting, do so in a public or at least a quasi public capacity, and when so acting the law presumes the validity and legality of their acts, and even though it should be claimed that they were acting simply in a private capacity, until overcome by proof, their acts, involving the performance of ministerial or administrative duties, such as those performed in the circulation and signing of these petitions, are presumed to be legal and not fraudulent.

Such is the holding of the Supreme Court of the Territory of Oklahoma in the case of *Watkins v. Hawighorst*, 13 Okla. 128, 74 Pac. 318, following the case of *Board of Education v. Boyer*, 5 Okla. 225, 47 Pac. 1090, wherein the court in the syllabus said:

"The law presumes the validity and regularity of the official acts of public officers within the line of their official duties, as it does the legality of acts of private persons, and this presumption obtains until overcome by proof as to the acts involving the performance of ministerial or administrative duties, except in cases where it is sought to take away personal rights of a citizen or deprive him of his property, or place a charge or lien thereon."

The statute provides (section 3675, Comp. Laws 1909):

"Each initiative petition and each referendum petition shall be duplicated for the securing of signatures, and each sheet for signatures shall be attached to a copy of the petition. Each copy of the petition and sheets for signatures is hereinafter termed a pamphlet. On the outer page of each pamphlet shall be printed the word 'warning' and underneath this in ten point type the words, 'It is a felony for any one to sign an initiative or referendum petition with any name other than his own or knowingly to sign his name more than once for the measure or to sign such petition when he is not a legal voter. * * *'"

The presumption above noted is further strengthened by the stringency of the provisions of this act. People are not presumed on mere conjecture, with no semblance of proof, to have com-

mitted felony by wholesale, especially with the act denouncing it staring them right in the face. These petitions, therefore, and the signatures thereto, are presumed to be valid, and the presumption obtains on the filing of the objections in the office of the Secretary of State that those who have signed them are legal voters of the state of Oklahoma, and this is the one provision that is the *sine qua non*, the substantial material element necessary in every case to constitute a valid signature, and the burden of proof to overcome this presumption should be and is, in every instance, upon the protestant, and, in the absence of any evidence of fraud, forgery, or other improper or wrongful conduct in securing the signers to the petitions sufficient to throw discredit upon the entire petition or upon a sufficient number, the same, in keeping with the presumption above noted, will be held valid. We do not mean to hold that the circulator's affidavit can be dispensed with, but that technical defects therein will not destroy the petition. Nor is the conclusion to which we have here come wanting in sanction in the statute. Section 3694, Comp. Laws 1909, contained in the act along with the other provisions of this law, provided as follows:

"The procedure herein prescribed is not mandatory, but if substantially followed will be sufficient. If the end aimed at can be attained and procedure shall be sustained, clerical and mere technical errors shall be disregarded."

Therefore, the fact, standing alone, that letters addressed to parties at the post offices given were returned in no greater number than here shown, or that more than one county was named as the residence of some of these petitioners, or that in transcribing the names the circulators of the petition failed to legibly write the same, all fall within the category of clerical and technical errors, and do not prevent the end aimed at from being attained, and such errors, under the mandate of the statute, it is our duty to disregard.

Under these circumstances, on the evidence and the objections presented to us, it is our finding and judgment that the petitions are valid under the form as required by the statute, and bore the signatures of a sufficient number of citizens and legal voters of the state of Oklahoma to require the submission of

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the question involved to the qualified electors of the state at the next general election, and it is ordered that the clerk of this court shall transmit all papers and documents on file in his office relating to such petitions to the Secretary of State, who is directed to conform to the requirements of the law in accordance with this opinion.

All the Justices concur.

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No. 1266. Opinion Filed November 26, 1912.

(128 Pac. 126.)

1. **LIBEL AND SLANDER—Privileged Communications—Malice.** In the absence of anything showing malice, one is not guilty of libel who sends to the Department of Justice for use before a Senate committee an affidavit containing criminatory matter against one who has preferred charges against the qualification and fitness of another for office who has been thereto appointed by the President and whose name by him has been sent to the Senate for confirmation, pending which and before said committee said charges are being investigated, and that, too, although the testimony therein contained is not pertinent to the subject of inquiry before the committee.
2. **SAME—Qualified Privilege—Question for Court.** Evidence examined, and held, that the court did not err in holding the communication a qualified privilege and in taking the question of malice away from the jury.

(Syllabus by the Court.)

Error from District Court, Oklahoma County;
John J. Carney, Judge.

Action by C. J. Tuohy against Oscar D. Halsell. Judgment for defendant, and plaintiff brings error. Affirmed.

Flynn, Chambers & Lowe and Everest, Smith & Campbell,
for plaintiff in error.

Burwell, Crockett & Johnson and J. W. Scothorn, for defendant in error.

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TURNER, C. J. This is an action for an alleged libel. The record discloses: That, prior to the time of making the alleged libelous affidavit by the defendant, the President of the United States had appointed and sent to the Senate for confirmation or rejection the name of John Embry to be United States attorney for the then territory of Oklahoma. That at the time said affidavit was made there were pending charges preferred by plaintiff against the qualification and fitness of said Embry for said office, and affidavits of plaintiff in support thereof had been submitted to the Department of Justice for use before the Senate committee having the charges under investigation. That testimony by affidavit was then being taken by examiners of the Department of Justice and assistant United States attorneys at Chandler and other places in Oklahoma to be transmitted to said Department and by it to the Senate committee for use as stated. That, for use in refuting the charges, said Embry, being authorized by the Senate committee and Department of Justice to take evidence in affidavit form anywhere in Oklahoma, pursuant thereto, on May 30, 1906, through counsel, secured from defendant for that purpose an affidavit which read:

"Territory of Oklahoma, Oklahoma County—ss.: Personally appeared Oscar-Halsell, he being first duly sworn, on his oath says: That he is a member of the firm of the Williamson-Halsell-Frasier Company engaged in the wholesale grocery business at Oklahoma City, Guthrie, Shawnee and Chickasha, in Oklahoma and Indian Territory. That he is intimately acquainted with C. J. Tuohy, now a representative of Tootle-Wheeler & Motter of St. Joseph, Mo. That said C. J. Tuohy was in his employ at one time, and that he discharged the said Tuohy from his employ by reason of his dishonesty. That said Tuohy was not a trustworthy, creditable or reliable person, while in their employ. Oscar Halsell. Subscribed and sworn to before me this 30th day of May, 1906. A. J. Crahan, Notary Public. [Seal.] My commission expires Sept. 11, 1906."

That the same was duly transmitted to the Department of Justice and so used, whereupon, when so informed, plaintiff brought this suit. The defense is that the publication was privileged. At the close of all the testimony the court, being of opinion that it was one of qualified privilege and made without

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malice, peremptorily instructed the jury to return a verdict for defendant, which was done, and judgment rendered and entered accordingly, and plaintiff brings the case here.

Assuming the same to contain criminatory matter, it seems that this is a privileged publication, made so by statute. Wilson's Rev. & Ann. St. 1903, sec. 2239, reads: "A privileged publication is one made: First, in any legislative or judicial proceeding or any other proceeding authorized by law"—which we take to mean one made in the course of any such proceeding. Chapter 130, sec. 1, of the St. of N. Y. (Acts 1854) makes privileged the publication in any newspaper "of any judicial, legislative or other public official proceedings" and "of any statement, * * * in the course of the same. * * *" As we can see, in comparing these statutes, no practical difference between "proceedings authorized by law" and "public official proceedings," it seems that both statutes were intended to cover the same field and the same kind of publications. In *Sanford v. Bennett*, 24 N. Y. 20, Denio, J., commenting on the New York statute, *supra*, said that the maxim of construction expressed in the term *noscitur a sociis* seemed to bear strong on the case, and that:

"I am persuaded that the transactions embraced within the purview of the statute are such as resemble judicial and legislative proceedings, such as transactions of administrative boards in which the subjects dealt with are liable to be considered, deliberated upon, discussed, and determined. It is to such proceedings only that the words, statements, speech, argument, or debate used in the act can be applied."

And in the syllabus:

"The statute relates only to statements made in judicial, legislative, or administrative bodies in execution of some public duty."

And so it seems that the affidavit complained of, taken to obviate the necessity of the personal appearance and testimony of defendant before the Senate committee, in a proceeding instituted pursuant to the inherent power of that body, and there used in evidence, falls squarely within the statute as a publication made, if not in a judicial or a legislative or administrative proceeding, was certainly made in the course of a proceeding authorized by

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law and in and to a body clothed with quasi judicial powers, sitting in execution of a public duty.

No case can be found exactly in point, but in *Duncan v. Atchison, etc., Ry. Co. et al.*, 72 Fed. 808, 19 C. C. A. 202, the court said:

"Section 47 of the Civil Code of California declares that 'a privileged communication is one made * * * (2) in any legislative or judicial proceeding or in any other official proceeding authorized by law.' In *Ball v. Rawles*, 93 Cal. 222, 236, 28 Pac. 937 [27 Am. St. Rep. 174], the Supreme Court, in construing this section, said: 'The effect of the provision is to make a complaint, in a court of justice which has jurisdiction of the offense charged, an absolute privilege, for which the complainant is not liable in a civil action. *Hollis c. Meaux*, 69 Cal. 625, 11 Pac. 248 [58 Am. Rep. 574].' Tested by the provisions of this statute, the conclusion of law arrived at by the circuit court, 'that all of the matters and things herein complained of were and are privileged,' and the judgment entered thereon, were clearly correct; for, conceding that the Interstate Commerce Commission is not a court of civil jurisdiction, it is nevertheless manifest that the pleadings herein complained of were filed in an 'official proceeding authorized by law.'"

And in the syllabus:

"Alleged libelous statements contained in an answer filed in proceedings before the Interstate Commerce Commission are absolutely privileged, under the California statute, which declares a privileged communication to be 'one made * * * in any legislative or judicial proceeding, or in any other official proceeding authorized by law.'"

But let this be as it may, the communication or publication was a qualified privilege, as held by the trial court. This privilege "extends to all communications made *bona fide* upon a subject-matter in which the party communicating has an interest, or in reference to which he has a duty to a person having a corresponding interest or duty, and to cases where the duty is not a legal one, but where it is of a moral or social character or imperfect obligation." 13 Am. & Eng. En. of Law, p. 411. Or, as stated in the syllabus in *Thomas S. Harrison v. Edwin Bush*, 5 E. & B., Q. B., 344:

"A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in refer-

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ence to which he had a duty to perform, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter which, without this privilege, would be slanderous and actionable. And this, though the duty be not a legal one, but only a moral or social duty of imperfect obligation."

In that case defendant was an elector of F. in the county of S. He, with other inhabitants of F., signed and transmitted to the home secretary a memorial complaining of the conduct of plaintiff, who was a justice of S., during a recent election, charging him with making speeches inciting a breach of the peace, and after reading the riot act with sending a man into the streets with orders to strike persons therein. It prayed the secretary to cause inquiry to be made touching the charges and, finding the same to be true, to recommend to the queen his removal from the commission. In a suit for libel the jury found that defendant acted without malice and in good faith. Lord Campbell, C. J., said:

"In the present case, little need be said to show that the communicator had both an interest and a duty in the subject-matter of the communication. Assuming that Dr. Harrison had misconducted himself as a magistrate in the matter alleged, all the electors and inhabitants of Frome had suffered a grievance by a magistrate having fomented the riot instead of quelling it, and having endangered instead of protecting life and property within the borough. They have an interest that they may not longer remain subject to the jurisdiction of a magistrate who so violates the law. Again, if Dr. Harrison had so misconducted himself as a magistrate, he had committed an offense; and it was the duty of those who witnessed it to try by all reasonable means in their power that it should be inquired into and punished. 'Duty,' in the proposed canon, cannot be confined to legal duties which may be enforced by indictment, action, or mandamus, but must include moral and social duties of imperfect obligation. * * *

In this land of law and liberty all who are aggrieved may seek redress; and the alleged misconduct of any who are clothed with public authority may be brought to the notice of those who have the power and the duty to inquire in it, and to take steps which may prevent the repetition of it."

And so we say that, although the affidavit complained of is on its face addressed to no one, as the evidence is undisputed that it was intended for use before the committee and was by affiant restricted, at the time it was made, to that use—the same

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was in effect nothing less than a communication by affiant on oath to the committee, and that, too, concerning a matter in which the qualification and fitness of another for office was being inquired into. It is needless to say that he not only had an interest in common with all good citizens in seeing that false charges were not sustained against the applicant, if innocent, but it was his duty to refute them if he could, and thus extend his aid to the committee in the work of securing for office one worthy of the trust. See, also *Bynam v. Collins*, 111 N. Y. 143, 19 N. E. 73, 2 L. R. A. 129, 7 Am. St. Rep. 726; *Finley v. Steele et al.*, 159 Mo. 299, 60 S. W. 108, 52 L. R. A. 852.

In *Posnett v. Marble*, 62 Vt. 481, 20 Atl. 813, 11 L. R. A. 162, 22 Am. St. Rep. 126, the statement complained of was made to a post-office inspector in reply to an inquiry by him in reference to an applicant for postmaster. The court said:

"The plaintiff was an applicant for the appointment to a public office. In view of her application, her character was a matter of public concern. The defendant was a member of the community immediately interested in the result of the application. Her conversation was with one who, she might naturally suppose, could prevent the appointment. The circumstances were such as to justify the defendant in communicating what she honestly believed as to the plaintiff's conduct and character. The selection of suitable persons for the performance of official service is essential to the interests of both the government and the citizen. These interests can be protected only by the communication of information and by free discussion concerning the fitness of applicants. It would tend to repress this necessary freedom, and would be a manifest injustice to the citizen, if communications of this character subjected the person making them to the payment of damages in the event of an honest mistake. * * * The occasion in question was not one of absolute privilege, but was so far privileged as to protect a communication made in good faith, and from an honest motive."

In *Cook v. Hill*, 3 Sandf. (N. Y.) 341, it was held that a memorial to the Postmaster General in reference to the business of his department, *e. g.*, the bidding for contracts which he was authorized to make by law, is a qualified privileged communication. In that case the memorial submitted proposals and protested against the execution of a contract to another, whose pro-

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posals had been accepted, charging upon the latter, fraud and collusion with other bidders. In speaking of communications of qualified privilege, the court said the class was very extensive, and enumerated among them an application to the appointing power in respect to a candidate for a public office as an illustration falling within that class.

But it is contended that the communication exceeded the privilege, in that the affidavit complained of was not confined to matter relating to the credibility of Tuohy as a witness, and for that reason the same was libelous. Assuming that the testimony contained in the affidavit was intended to assail the credibility of Tuohy as a witness, we think the most that can be said of it is that, instead of assailing his general reputation in the community in which he lived, it testified to the personal opinion of the witness, and for that reason was irrelevant to the issue before the committee. Published as it was in the course of proceedings authorized by law, as we have just held, although the allegations therein contained were not pertinent thereto, the law, independent of statute, will not presume malice therefrom, but will require plaintiff to prove express malice in addition thereto before he can recover. This is the rule laid down with reference to alleged libelous publications made in the course of legal proceedings, and we see no reason why it should not obtain here. In *Cooper v. Phipps et al.*, 24 Ore. 357, 33 Pac. 985, 22 L. R. A. 836, in the syllabus it is said:

“A witness in an action is not liable for libel, unless it is shown affirmatively that her statements were not pertinent to the matter in progress, and were spoken maliciously and with a view to defame the one claiming to be injured thereby.”

In *Lawson v. Hicks*, 38 Ala. 279, 81 Am. Dec. 49, the court said:

“Words, spoken or written, in the course of a judicial proceeding by the parties, or the counsel, if relevant will not support an action for defamation; nor when irrelevant, if the speaker or writer believed that they were relevant, and had reasonable or probable cause so to believe; nor in any cause, without proof of actual malice.”

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In *Myers v. Hodges*, 53 Fla. 197, 44 South. 357, in the syllabus it is said:

"Defamatory words published in the due course of a judicial procedure, and not relevant or pertinent to the subject of inquiry, are conditionally or qualifiedly privileged; that is, *prima facie* privileged. If the publication be irrelevant, they do not necessarily become actionable. They must be malicious as well as irrelevant. If it appear upon the trial that the libelous allegations were published in the due course of legal procedure, though it be proved that the allegations were not pertinent to the legal procedure, still the law does not presume malice on the part of the defendant; but the plaintiff must prove express malice, to entitle him to recover. The simple fact that the libelous matters were published in the due course of legal procedure, though the libelous matters were impertinent, rebuts the *prima facie* presumption of malice, and makes it incumbent on the plaintiff to prove express malice; the case being what is called a conditionally privileged publication."

Without questioning the rule to be that the burden of proving malice was upon him as stated, it is next contended by counsel for Tuohy that the court erred in taking the question of malice away from the jury, which he did in instructing peremptorily for defendant. Not so, for the reason that there was no evidence of malice to go to the jury, and that, too, whether the burden of proving or disproving it was one way or the other. In instructing the jury as stated, the court so found and stated:

"Six years had intervened from the time the plaintiff was discharged by the defendant until the time of the making of this alleged libelous publication. During that time, so far as the evidence goes, there was nothing to indicate any ill feeling existed on the part of the defendant against the plaintiff, other than the fact that he had been discharged six years prior to that time and some little difficulty occurred then; there was no evidence to show any hostility or ill feeling. The evidence shows that, at the time this application was made to the defendant for the affidavit to be used in the manner suggested, he hesitated and then refused absolutely at first to make it. That upon urgent solicitation upon the part of Mr. Hoffman that it would only be used for one purpose and never would be seen beyond the Department of Justice or in the Senate committee before which it was going to be used, and the further promise that it was a privileged communication, this defendant finally consented to

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make an affidavit. One was dictated by Mr. Hoffman. Its terms seemingly were too harsh and reflected too much upon the plaintiff, and Mr. Halsell refused to make it. Then it was suggested that Mr. Hoffman dictate another affidavit, and this was done, and then again, after having been assured that this affidavit would be used only for one purpose, and that for the purpose of refuting the charges made against Mr. Embry in the United States Department of Justice and before the subcommittee of the United States Senate, the Judicial Committee, consented to make the affidavit. It is very evident to the mind of the court that under those circumstances, and with no evidence to controvert or contradict these propositions, if a judgment were rendered by this jury against the defendant, the court could not in conscience allow the verdict to stand. For we believe that the evidence in this case shows conclusively that Mr. Halsell was not actuated by any malice or malicious motives or actuated by other than worthy motives; that is, the protection and defense of a man who had been assaulted in the Department of Justice by the affidavits made by the plaintiff."

This being the state of the record, the duty of the court was clear, and the rule announced in the syllabus in *Myers v. Hodges*, *supra*, obtains here:

"The facts being uncontroverted, the court is to determine whether or not the publication is privileged. If the publication be absolutely privileged, that determines the action. If the publication be conditionally privileged, then it is a matter of law for the court to determine whether there is any intrinsic or extrinsic evidence of malice. If there is no such evidence, it is proper for the court to direct a verdict for the defendant."

This was done and, there being no error in the record, the judgment of the trial court is affirmed.

HAYES, WILLIAMS, and DUNN, JJ., concur; KANE, J., absent, and not participating.

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NOBLE v. FOX *et al.*

No. 1857. Opinion Filed November 26, 1912.

(128 Pac. 102.)

SALES—Action for Price—Fraud as a Defense. Where several persons, for the purpose of buying a horse, mutually agree to pay a certain price for him, a secret agreement between the vendor and one of them, whereby he received his share in the horse for nothing for securing the others to join with him in the purchase, is such a fraud as will entitle defendants to defeat recovery on the notes evidencing their promise to pay the purchase money.

(Syllabus by the Court.)

*Error from Superior Court, Pottawatomie County;
Geo. C. Abernathy, Judge.*

Action by C. O. Noble against Charles Fox and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Paul F. Cooper, for plaintiff in error.

Blakeney, Maxey & Miley, for defendants in error.

TURNER, C. J. On September 7, 1909, C. O. Noble, plaintiff in error, sued Charles Fox and eleven others in the superior court of Pottawatomie county on two certain promissory notes for \$800, dated February 1, 1907, due September 1, 1908, and September 1, 1909, respectively, with interest from date payable to plaintiff. For answer the eleven other defendants admitted the signing of the notes, but alleged fraud in their execution and a tender back of the horse in payment for which they were given, and prayed for and obtained an order temporarily restraining plaintiff from negotiating a third note, given at the same time for the same purpose and not yet due, and that it be called in and canceled.

For separate answer Fox alleged that prior to the execution of the notes it was secretly agreed between himself and Noble that if he would form one of a "partnership" of twelve and buy the

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horse for \$2,400 plaintiff would pay defendant \$200, his share of the purchase price, and release him from liability on the notes; that defendant accepted the offer, formed the partnership consisting of the twelve defendants, including himself, and that the horse was purchased and the notes signed by all of them; that about the time this action was commenced the other eleven defendants discovered the fraud and rescinded the sale, by reason of which, he says, he should be released from liability, as the consideration of said notes, as to him, had failed. He further alleged that the horse was not worth, at the time the notes were executed, to exceed \$600.

After reply filed, there was trial to a jury, and defendants, assuming the burden of proof, introduced testimony to maintain the issues. At the close of all the testimony the court instructed the jury to return a verdict for defendants, which was done, and judgment rendered and entered accordingly, to reverse which plaintiff brings the case here.

There is no conflict in the testimony. Viewing it in the light most favorable to plaintiff, the court did not err in directing the verdict for defendants. The evidence discloses that Noble was a dealer in fine horses, and Fox an extensive and influential farmer living in the vicinity of McComb; that Noble was so informed, and a short time prior to the execution of the notes in controversy came to McComb with a stallion which he had for sale, and there met Fox; that after some talk it was finally agreed between plaintiff and Fox, with the understanding that nothing would be said about it, that if Fox would "form a partnership" of twelve, including himself, which would buy the horse from plaintiff at \$200 a share, he would pay Fox \$200 by turning over to him a check for that amount, then placed on deposit, as soon as the work was done, which he did, and which was afterwards cashed by Fox; that knowing Fox to be a successful stockman, and believing him when he said, as he did, that it was a good thing, an understanding was soon reached, whereby it was agreed by and between Noble, Fox, and the other eleven defendants, as follows:

"We, the undersigned, being impressed with the necessity of improving our stock, agree to buy one Percheron horse, which we have examined, of C. O. Noble, of the value of two hundred

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a share, name of horse Major Rockwell, capital stock and price of horse \$2,400.00, and we each, for ourselves, agree to and with said C. O. Noble and with each other that we will pay in cash at the time of delivery of said horse by C. O. Noble, to any subscriber hereto, the sum set opposite our names respectfully, or at our option we may execute a joint note payable to said C. O. Noble or bearer, secured to his satisfaction, payable one-third in one year, one-third in two years, and one-third in three years from September 1st, 1907, in equal annual installments, with interest at 7%.

"Names.

No. of Shares.

"Chas. Fox.

One."

[Names of eleven other defendants for one share each.]

When the horse proved a failure, which he did for three succeeding seasons, defendants tendered him back to Noble, who, when the notes in controversy were due and unpaid, brought this suit, after which the other eleven defendants discovered the secret agreement aforesaid for the first time. As it is thus apparent that by this agreement, unknown to the eleven defendants, the stock of Fox in the horse was to cost him nothing, what we said in *Gilpin v. Netograph Machine Co. et al.*, 25 Okla. 408, 108 Pac. 382, 29 L. R. A. (N. S.) 477, is equally applicable here. There we said:

"It is impossible to read this record without being impressed that Ladd was simply acting as a decoy for Fryhofer, as agent for defendant in error, to get his copartners into this deal, whereby, unknown to any of them, his one-fifth interest in the property should cost him nothing. Any such trick as that is a fraud. The representation by Fryhofer and Ladd as an inducement to defendant to purchase, that Ladd, whom defendant regarded highly for his honesty, good faith, and judgment, had agreed to likewise purchase on the same terms, without disclosing the fact that Ladd's interest in the machine was to be given him as a gratuity for securing defendant and others to purchase, was such a fraud as will entitle defendant to defeat a recovery on the notes sued upon."

In *Jeffress v. Phillips*, 31 Okla. 202, 120 Pac. 916, we said in the syllabus:

"Where, in a suit on two promissory notes, the testimony reasonably tends to prove that the same were given by defendants and another in part payment of a certain printing plant and

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good will of a newspaper, that they were induced to sign said notes by plaintiff and D., who was a practical printer and newspaper man in his employ, and upon whose judgment they relied, who represented it to be a good investment, and that he would join in the purchase thereof and pay for and share therein equally with them, that after the property was sold and the notes sued on were executed, pursuant to a secret agreement between plaintiff and D., plaintiff returned or destroyed his check for \$500, given in part payment of his share of the purchase price, *held*, that the evidence was sufficient to take the case to the jury on the question of fraud."

In *James McEwen v. B. P. Shannon & Co.*, 64 Vt. 583, 25 Atl. 661, in the syllabus it is said:

"Where several persons, for the purpose of inducing each other to have their cream manufactured into butter at a certain place, mutually agree to pay a certain price per pound for this service, a secret agreement between one of these persons and the company which is to do the manufacturing that the cream of that person shall be manufactured for a less price is fraudulent."

We will not consider whether the demurrer to the answer of Fox should have been sustained, for the reason that no question of law is raised in the brief in support of the proposition, and for the further reason that, as Noble and Fox are *in pari delicto*, we leave them where we found them.

We are therefore of opinion that, the evidence being undisputed, the court did right to withdraw the case from the jury and direct a verdict for defendants. *Neely v. S. W. Cotton Co.*, 13 Okla. 356, 75 Pac. 537, 64 L. R. A. 145.

All the Justices concur.

Tovera v. Parker et al.

TOVERA v. PARKER *et al.*

No. 1913. Opinion Filed November 26, 1912.

(128 Pac. 101.)

BILLS AND NOTES—Delivery—Conditions. A promissory note may be delivered by the maker to the payee upon condition, or as an escrow.

(Syllabus by the Court.)

*Error from Lincoln County Court;
Fred A. Wagoner, Judge.*

Action by J. W. Parker and L. R. Cocklin against W. A. Tovera. Judgment for plaintiffs, and defendant brings error. Reversed.

S. D. Decker and Vick S. Decker, for plaintiff in error.

Malcolm D. Owen and Harry W. Harris, for defendants in error.

TURNER, C. J. On January 13, 1909, J. W. Parker and L. R. Cocklin, partners as Parker & Cocklin, defendants in error, sued W. A. Tovera, plaintiff in error, in the county court of Lincoln county in replevin for two mules, alleging a special property therein and right of possession thereto by virtue of a chattel mortgage thereon, executed by defendant to the Lincoln County Co-Operative Association, a corporation at Wellston, Okla., on February 17, 1908, to secure to the corporation a nonnegotiable promissory note for \$100 of even date, and by the corporation, for value before maturity, indorsed to plaintiffs, and which said note was due and unpaid. After answer filed, in effect a general denial, there was trial to a jury and judgment for plaintiffs, and defendant brings the case here.

From the testimony it appears that the corporation was doing business at Wellston, and about January 1, 1908, desiring to establish a branch at Midlothian in that county, sent its agents

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throughout that vicinity to take subscription notes for its stock; that defendant executed his three promissory notes therefor, aggregating \$100, payable to the corporation, and thereafter took certain steps to investigate its affairs; that on February 17, 1908, a stockholders' meeting was called at Midlothian schoolhouse, and defendant attended, together with other stockholders and friends of the corporation; that a Mr. Eddy, the business manager of the corporation, addressed the meeting and explained to those who had executed unsecured notes for stock, as had defendant, that such could not be used at the bank as collateral for borrowing money, and that it was desirable that secured notes be executed; that a certain gin and the Christie stock of goods were for sale at Midlothian, which the corporation desired to purchase; whereupon the note and mortgage in question were executed. Thus far there is no conflict in the testimony. But from this point it conflicts. Witnesses for defendant testify that the same were then and there executed and delivered to the corporation conditionally upon the strength of an understanding with Mr. Eddy, gathered from his statements there made in open meeting, that if the corporation could get 100 secured notes of like amount it would purchase the gin and stock of goods, but if it could not the notes would be returned to the makers. Other witnesses testify that such was not the understanding, but that the understanding was that the notes were executed in payment for stock in the concern which, they say, was subsequently issued. All agree that the desired 100 secured notes of like amount were never obtained; nor were the gin and stock of goods purchased by the corporation.

Thus it will be seen that the case turned upon the question of fact whether the note and mortgage forming the basis of plaintiffs' title were or were not delivered conditionally. This question was submitted to the jury and found in favor of plaintiffs, which would settle it, so far as we are concerned, had not the court instructed:

"The jury are instructed, as a matter of law, that a delivery in escrow can only be made to a stranger. It cannot be made to a party to the transaction. And that if delivery in escrow be made to a party to the transaction, no matter what may be the

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form of the words or condition upon which it is delivered, the note takes effect discharged of the condition on which the delivery was made."

This was error as assigned. It is not true, as there stated, that it takes the intervention of a third party to make an escrow note effectual; but the same may be conditionally delivered, as here, to the payee. 4 Am. & Eng. Enc. of Law, p. 204, says:

"Bills and notes may be delivered to take effect, not at all events, but conditionally upon the happening of a future contingency, and this may be accomplished either by a formal delivery in escrow into the hands of a third person for the promisee, or by delivery to the promisee himself in the nature of an escrow; the intervention of a third person not being absolutely necessary, according to the better doctrine, to make the transfer in effect conditional."

Recognizing this doctrine in *Farmers' Bank of Roff v. Nichols*, 25 Okla. 550, 106 Pac. 835, 138 Am. St. Rep. 931, 21 Ann. Cas. 1160, we said:

"The authorities hold that where the maker of a note delivers it to the payee with the agreement that it shall not take effect until the happening of a certain contingency or the performance of a certain condition, and where neither the contingency has occurred nor the condition been performed, the note never became operative; and an action thereon by the payee or his assignee with notice cannot be maintained. *Johnson v. First National Bank of Morrison*, 24 Ill. App. 352; *Mendenhall v. Ulrich*, 94 Minn. 100, 101 N. W. 1057. See, also, *Myrich v. Purcell et al.* [95 Minn. 133, 103 N. W. 902], 5 Ann. Cas. 148. And this is true although the contemporaneous agreement be parol. *Graham et al. v. Remmel*, 76 Ark. 140, 88 S. W. 899 [6 Ann. Cas. 167]; *Mehlin v. Mut. Res. Fund Life Ass'n*, 2 Ind T. 396, 51 S. W. 1063; Joyce on Defenses to Com. Paper, sec. 310."

In *Burke v. Dulaney*, 153 U. S. at page 233, 14 Sup. Ct. at page 818, 38 L. Ed. 698, Mr. Justice Harlan, speaking for the court, said:

"The issue here is between the original parties to the note. And the evidence offered by the appellant, and excluded by the court, did not in any true sense contradict the terms of the writing in suit, nor vary their legal import, but tended to show that the written instrument was never, in fact, delivered as a present contract, unconditionally binding upon the obligor according to its terms from the time of such delivery, but was left in the hands of

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Delaney, to become an absolute obligation of the maker in the event of his electing, upon examination or investigation, to take the stipulated interest in the property in question. In other words, according to the evidence offered and excluded, the written instrument, upon which this suit is based, was not, except in a named contingency, to become a contract, or a promissory note which the payee could at any time rightfully transfer. Evidence of such an oral agreement would show that the contingency never happened, and would not be in contradiction of the writing. It would prove that there never was any concluded, binding contract entitling the party who claimed the benefit of it to enforce its stipulations."

Reversed.

All the Justices concur.

RENTIE *et al.* v. McCOY *et al.*

No. 2961. Opinion Filed November 26, 1912.

(128 Pac. 244.)

1. **INDIANS—Lands—Alienation.** Scott Rentie, a minor, and a duly enrolled Creek freedman, died July 2, 1899, without a surviving widow or children; his allotment not then having been selected. On August 15, 1902, his distributive share of land, as a member of said tribe, was allotted to his heirs.

On April 8, 1905, Morris and Katie Rentie, who were the father and mother of Scott Rentie, and his surviving heirs, executed in due form a warranty deed covering said allotment to D. On May 25, 1905, D. conveyed by warranty deed to E. M., who then and there took possession of said premises and remained in possession until he conveyed to H. M., to whom he surrendered possession. H. M. continued in possession until 1909, when an ejectment action was brought for possession. **Held:**

(a) That said land passed to Morris and Katie Rentie free from restrictions.

(b) That said land was alienable on April 8, 1905, when Morris and Katie Rentie conveyed to D.

2. **TRIAL—Demurrer to Evidence—Uncontroverted Evidence.** The facts in the record without contradiction showing a delivery of a deed executed on April 8, 1905, no error was committed in sustaining a demurrer to the evidence of plaintiffs (plaintiffs in error).

(Syllabus by the Court.)

Rentie et al. v. McCoy et al.

*Error from District Court, Tulsa County;
L. M. Poe, Judge.*

Action by Morris Rentie and others against Harriet P. McCoy and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

J. J. Henderson, for plaintiffs in error.

Roach & Bradley, for defendants in error.

WILLIAMS, J. The plaintiffs in error; to wit, Morris Rentie, Katie Rentie, and Solomon Blevins, as plaintiffs, brought an action in ejectment in the lower court against the defendants in error, Harriet P. McCoy, Edward McCoy, and J. C. Cloud, as defendants, for the possession of 160 acres of land situated in Tulsa county. This proceeding in error is to review the judgment therein.

The parties will be referred to in the order in which they appeared in the trial court.

The land sued for on August 15, 1902, was allotted to the heirs of Scott Rentie, who was a Creek freedman, and who died on July 2, 1899, not having selected his allotment; the said Scott Rentie being a minor.

Under act of Congress of March 1, 1901, entitled "An act to ratify and confirm an agreement with the Muskogee or Creek tribe of Indians, and for other purposes" (chapter 676, 31 St. at L. 869), section 28 provides:

"All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the act of Congress approved June twenty-eight, eighteen hundred and ninety-eight, entitled 'An act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said commission under said act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation. * * *"

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The act of June 30, 1902, entitled "An act to ratify and confirm a Supplemental Agreement with the Creek tribe of Indians, and for other purposes" (chapter 1323, 32 St. at L. 500), section 6, provides:

"The provisions of the act of Congress approved March 1, 1901 (31 St. at L. 861) in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas, now in force in Indian Territory: Provided, that only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: And provided further, that if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to noncitizen heirs in the order named in said chapter 49."

Morris Rentie and Katie Rentie were the father and mother of said Scott Rentie.

In *Shulthis v. McDougal et al.*, 95 C. C. A. 615, 170 Fed. 529, section 7 of the act of June 30, 1902, which provides that the lands and moneys to which such members of the Creek tribe of Indians were entitled should descend to their heirs in accordance with the provisions of said section 6, was construed, and the word "descend" there held to indicate the character of the title or estate which passed to the heirs, it not being intended that they should take the property as an additional bounty from the tribe, but by virtue of their heirship, said title being one of inheritance rather than of purchase, the situation being made the same by such provision as though the title had become vested in the decedent before his death; and that the land, to which the decedent was entitled, and which was the common property of the tribe, did not, strictly speaking, come to him by grant, inheritance, or purchase, but by a division of lands held in effect by a tenancy in common, to an interest in which he was born as a member of the tribe entitled to enrollment therein; but that, applying the statute by analogy, such land was not a "new acquisition," but came to him by the blood of his tribal parent; and that therefore on his death and the subsequent allotment, such tribal parent took the full title and not merely a life estate.

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In *Shulthis v. McDougal et al.*, 225 U. S. 561, 32 Sup. Ct. 704, 56 L. Ed. 1205, decided by the Supreme Court of the United States on June 7, 1912, it was held that said case was one in which the jurisdiction of the Circuit Court depended entirely upon the theory of diverse citizenship, and therefore the judgment of the Circuit Court of Appeals was final.

But it is not essential, in order to dispose of this case, to determine whether Morris and Katie Rentie took under the act of March 1, 1901, or June 30, 1902, as the father and mother. Morris Rentie and Katie Rentie were both enrolled as Creek freedmen, and executed the deed to Davis.

Only two questions are essential to be determined under this record:

Was said 160 acres of land, which comprehended the entire allotment of a member of the Creek tribe of Indians, free from restrictions at the time the same was conveyed by said Renties to Davis on April 8, 1905?

1. Section 16 of the Creek Supplemental Agreement (32 St. at L. 503) provides:

"Lands allotted to citizens (of the Creek Nation) shall not in any manner whatever, or at any time, be incumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this Supplemental Agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear. * * * The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will, free from the limitation herein imposed, and if this be not done the land embraced in his homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise prescribed."

Section 22 of the Choctaw and Chickasaw Supplemental Agreement (32 St. at L. p. 643, c. 1362) provides:

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"If any person whose name appears upon the rolls prepared as herein provided, shall have died subsequent to the ratification of this agreement and before receiving his allotment of land, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: Provided, that the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and practicable time, the Commission to the Five Civilized Tribes shall designate the lands thus to be allotted."

In *Mullen et al. v. United States*, 224 U. S. 455, 32 Sup. Ct. 498, 56 L. Ed. 834, it is said:

"In cases falling within this paragraph (said section 22), there is no requirement for the selection of any portion of the allotted lands as a homestead, and there is no ground for supposing that it was the intention of Congress that a provision for such selection should be read into the paragraph, so as to assimilate it to paragraph 12, relating to allotments to living members. While the lands were to be allotted in the name of the deceased allottee, they passed at once to his heirs, and as each heir, if a member of the tribe, was already supplied with his homestead of 160 acres, there was no occasion for a further selection for that purpose from the inherited lands. No distinction is made between the heirs; they might or might not be members of the tribe; and, where there were a number of heirs, each would take his undivided share. It is quite evident that there is no basis for implying the requirement that in such case there should be a selection of a portion of the allotment as a homestead, and all the lands allotted under paragraph 22 are plainly upon the same footing. While it appears from the record that, in the present case, separate certificates of allotment were issued for homestead and surplus lands, this was without the sanction of the statute.

"In the agreement with the Creek Indians (Act of March 1, 1901, 31 St. at L. 861, 870, c. 676), it was provided that in the case of the death of a citizen of the tribe after his name had been placed upon the tribal roll made by the commission, and before receiving his allotment, the lands and moneys to which he would have been entitled, if living, should descend to his heirs, 'and be

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allotted and distributed to them accordingly.' The question arose whether, in such cases, there should be a designation of a portion of the allotment as a homestead. In an opinion under date of March 16, 1903, the then Assistant Attorney General for the Interior Department (Mr. Van Devanter) advised the Secretary of the Interior that this was not required by the statute. He said: 'After a careful consideration of the provisions of law pertinent to the question presented, and of the views of the Commissioner of Indian Affairs and the Commission to the Five Civilized Tribes, I agree with the latter that, in all cases where allotment is made directly to an enrolled citizen, it is necessary that a homestead be selected therefrom and conveyed to him by separate deed; but that, where the allotment is made directly to the heirs of a deceased citizen, there is no reason or necessity for designating a homestead out of such lands, or of giving the heirs a separate deed for any portion of the allotment, and therefore advise the adoption of that rule.' It is true that under the Creek Agreement, in cases where the ancestor died before allotment, the lands were to be allotted directly to the heirs, while under the Choctaw and Chickasaw Agreement the allotment was to be made in the name of the deceased member, and 'descend to his heirs.' This, however, is a merely formal distinction and implies no difference in substance. In both cases the lands were to go immediately to the heirs, and the mere circumstance that, under the language of the statute, the allotment was to be made in the name of the deceased ancestor, instead of the names of the heirs, furnishes no reason for implying a requirement that there should be a designation of a portion of the lands as homestead.

"We have, then, a case where all the allotted lands going to the heirs are of the same character, and there is no restriction upon the right of alienation expressed in the statute. Had the lands been allotted in the lifetime of the ancestor, one-half of them, constituting homestead, would have been free from restriction upon his death. The only difficulty springs from the language of paragraph 16, limiting the right of heirs to sell 'surplus' lands. But, on examining the context, it appears that this provision is part of the scheme for allotments to living members, where there is a segregation of homestead and surplus lands respectively. Whatever the policy of such a distinction which gives a greater freedom for the disposition by heirs of homestead lands than of the additional lands, there is no warrant for importing it into paragraph 22, where there is no such segregation. It would be manifestly inappropriate to imply the restriction in such cases, so as to make it applicable to all the lands taken by the heirs,

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and there is no occasion or authority for creating a division of the lands so as to impose a restriction upon a part of them.

"There being no restriction upon the right of alienation, the heirs in the cases involved in this appeal were entitled to make the conveyances. The bill alleged that the tracts embraced in these conveyances were 'allotted lands,' and certificates of allotment had been issued. These Indian heirs were vested with an interest in the property which, in the absence of any provision to the contrary, was the subject of sale. The fact that they were 'full-blood' Indians makes no difference in this case, for, at the time of the conveyances in question, heirs of the full-blood, taking under the provisions of paragraph 22 of the supplemental agreement, had the same right of alienation as other heirs."

The same conclusion had, prior to that decision by the Supreme Court of the United States, been reached by this court in *Hancock et al. v. Mutual Trust Co. et al.*, 24 Okla. 391, 103 Pac. 566. See, also, *United States v. Jacobs* (C. C. A.) 195 Fed. 707.

This land having been allotted to the heirs by virtue of section 28, *supra*, under *Mullen et al. v. United States, supra*, there being no distinction between section 22 of the Choctaw and Chickasaw Supplemental Agreement and section 28 of the Creek Agreement, it being held that section 16 was no part of the scheme for allotment to living members of the Choctaw and Chickasaw tribes, section 16 of said Creek Agreement is a part of the scheme of allotment for living members, and not where they died prior to allotment. That being true, the allotment having been made to the heirs under said section 28, whether mixed or full-bloods, they took it free from restrictions and the same was alienable. See, also, *Reed v. Welty* (D. C.) 197 Fed. 419, which holds to the same effect.

The act of Congress of April 21, 1904 (chapter 1402, 33 St. at L. 204), provides:

"And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who were not of Indian blood, except minors, and except as to homesteads, are hereby removed, and all the restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads may, with the approval of the Secretary

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of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe. * * *

This provision was construed in *Godfrey v. Iowa Land & Trust Co.*, 21 Okla. 293, 95 Pac. 792, and in *Goat et al. v. United States*, 224 U. S. 458, 32 Sup. Ct. 544, 56 L. Ed. 841, decided by the United States Supreme Court on April 29, 1912. Under said provision of the act of April 21, 1904, *supra*, the restrictions upon the alienation of lands of all allottees of the Creek tribe of Indians who were not of Indian blood, except minors, and except as to homesteads, were removed.

In the case at bar the land was allotted to the heirs of Scott Rentie, pursuant to the provisions of section 28 of the Creek Agreement of March 1, 1901, *supra*, wherein it was provided that certain lands should be allotted to the heirs and distributed to them according to the laws of descent and distribution of the Creek Nation. Where members of the Creek tribe were living, the land was allotted to such member of the tribe; but where dead before allotment, and the land was allotted under said section 28, *supra*, the allotment was made to the heirs; and, although the heir may not have been a member of the Creek tribe (section 6, c. 1323, 32 St. at L. 501), and may not have, by virtue of any membership in such tribe, participated in receiving a distributive share by virtue of such membership, under the terms of this legislation he had land allotted to him if he was an heir of said deceased Indian. If so, was such heir an allottee within the terms of the act of April 21, 1904, *supra*? The heirs of Scott Rentie being freedmen and adults and not of Indian blood, as to such land except homesteads as was allotted to them as his heirs the restriction thereon was removed by said provision of the act of April 21, 1904.

In *Frame et al. v. Bivens et al.* (C. C.) 189 Fed. 785, Judge Campbell, in construing that portion of the act of April 21, 1904 (33 St. at L. p. 204, c. 1402, sec. 1), said:

"In view of the class of persons, the character of the land affected by the act, and the local conditions and circumstances which evidently occasioned this legislation, I cannot conceive that Congress intended that while an individual of the class named might convey his land by deed absolute and indefeasible, without

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regard to the adequacy of the consideration, he might not convey it conditionally as provided by this mortgage."

Assuming for the purpose of this case that the restrictions imposed by section 16 of the Creek Agreement of March 1, 1901, applied to the land allotted to the heirs of Scott Rentie, it would be inconceivable that Congress intended to remove restrictions upon the lands of the members of the tribe who had had allotted to them, as a part of their distributive share of the public domain of the Creek Nation, certain lands as their allotments, where they were adults and not of Indian blood, and the same was not their homestead, and at the same time it did not intend to remove such restrictions as existed on heirs who had had allotted to them certain lands as the heirs of a member of said tribe; such heirs being adults and not of Indian blood, and the land not being a part of the homestead.

Did any restriction remain on the other 40 acres, to wit, the homestead, after the death of Scott Rentie?

Section 8 of chapter 1323 (Act of June 30, 1902, 32 St. at L. 501) provided:

"All children who have not heretofore been listed for enrollment living May 25, 1901, born to citizens whose names appear upon the authenticated rolls of 1890 or upon the authenticated rolls of 1895 and entitled to enrollment as provided by the act of Congress approved March 1, 1901 (31 St. at L. 861), shall be placed on the rolls made by said commission. And if any such child has died since May 25, 1901, or may hereafter die, before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled to if living shall descend to his heirs as herein provided and be allotted and distributed to them accordingly."

Section 6 of the same act provides:

"The descent and distribution of land and money provided for in said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: Provided, that only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: And provided further, that if there be no persons of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to noncitizen heirs in the order named in said chapter 49."

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Such "heirs were vested with an interest in the property, which, in the absence of any provision to the contrary, was the subject of sale." (*Goat et al. v. United States, supra*; *Mullen et al. v. United States, supra*.) This section is illuminative in construing section 16 of the same act, which provides:

"The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will, free from the limitation herein imposed, and if this be not done the land embraced in his homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise prescribed."

Section 6, c. 1323 (32 St. at L. 501), having repealed the "provisions of the act of Congress approved March 1, 1901 (31 St. at L. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation," provided that "the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas" then in force in the Indian Territory; "provided, that only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation; and provided further, that if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to noncitizen heirs in the order named in said chapter 49." Section 7 provided that:

"All children born to those citizens who are entitled to enrollment as provided by the act of Congress approved March 1, 1901 (31 St. at L. 861), subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said commission. And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided and be allotted and distributed to them accordingly."

Said sections 7 and 8 shed light in the construction of said section 16 of the same act. The homestead of each citizen shall remain after the death of the allottee for the use and support of the children born to him after May 25, 1901; but if he have

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no such issue then he may dispose of his homestead by will free from the limitation herein imposed, and if this be not done the land embraced in his homestead shall descend to his heirs free from such limitation, according to the laws of descent herein otherwise prescribed.

In the former part of section 16 it was provided that:

"Lands allotted to citizens shall not in any manner whatever or at any time be incumbered, taken or sold to secure or satisfy any debt or obligation or be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear."

Obviously the homestead descends at the death of the allottee, where no will has been made, according to the laws of descent prescribed in said act free from any limitation against alienation.

The Choctaw and Chickasaw homesteads are alienable by the heirs upon the death of the allottee. Section 12, c. 1362, 32 St. at L. 642; *Mullen et al. v. United States*, *supra*.

Section 8, c. 994 (32 St. at L. 982), of the Seminole Agreement provided that:

"The homestead * * * shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the deed for the allotment. A separate deed shall be issued for said homestead and during the time the same is held by the allottee it shall not be liable for any debt contracted by the owner thereof."

Section 13, c. 1375, of the Cherokee Agreement (32 St. at L. 716, 717), provides:

"Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the

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time said homestead is held by the allottee the same shall be nontaxable and shall not be liable for any debt contracted by the owner thereof while so held by him."

Upon the authority of *Mullen et al. v. United States*, the Seminole and Cherokee homesteads likewise become alienable upon the death of the allottee. Now to conclude that the five-year limitation contained in the first paragraph of section 16, c. 1323, of the Supplemental Creek Agreement (32 St. at L. 503), remained on the land after the death of the allottee, would be to reach a conclusion at variance with the scheme in the allotment of the Five Civilized Tribes, and is not borne out by the context of said Supplemental Creek Treaty.

The same conclusion reached in this case has also been reached by Judge Campbell of the United States District Court of the Eastern District of Oklahoma. *In re Lands of Five Civilized Tribes*, 199 Fed. 811.

So far as *Barnes v. Stonebraker*, 28 Okla. 75, 113 Pac. 903, and *Sanders v. Sanders et al.*, 28 Okla. 59, 117 Pac. 338, are not in harmony with this opinion, the same are overruled.

It is clear to our minds that the deed was delivered, and that there is no conflict in the evidence that would require a submission of such question to the jury. This is not a suit to reform the deed and have it declared a conveyance for a life estate. If the deed had been for a life estate, and Rentie had an estate in fee, he could not retake the premises during his lifetime. The holder of the reversionary interest would be the only one that would be entitled to possession, which would be after his death.

All the Justices concur.

Chicago, R. I. & P. Ry. Co. et al. v. Filson et al.

CHICAGO, R. I. & P. RY. CO. *et al.* v. FILSON *et al.*

No. 3437. Opinion Filed November 26, 1912.

(128 Pac. 298.)

1. **CARRIERS—Regulation—Power of Corporation Commission.** Section 18 (1), art. 9, of the Constitution (section 234, Williams' Ann. Const. Okla.), empowers the Corporation Commission with authority to supervise, regulate, and control railroad companies in this state in all matters relative to the performance of their public duties and their charges therefor, and to prevent unjust discrimination by such companies in the performance of such duties and their charges.
2. **SAME—Regulation of Charges—Constitutional Provisions.** By section 13 of article 9 of the Constitution (section 229, Williams' Ann. Const. Okla.), railroad companies are permitted to issue or give free tickets, free passes, or other free transportation to baggage agents traveling on their trains.
 - (a) Such baggage agent under the terms of said section is not required to be an employee of such company.

(Syllabus by the Court.)

Turner, C. J., dissenting.

Appeal from State Corporation Commission.

Complaint by Theodore Filson and others against the Chicago, Rock Island & Pacific Railway Company and others, before the Corporation Commission. From an order of the Commission, the Railway Company and others appeal. Reversed and remanded, with instructions to dismiss complaint.

C. O. Blake, Cottingham & Bledsoe, R. A. Kleinschmidt, and Clifford L. Jackson, for appellants.

Chas. West, Atty. Gen., and *Chas. L. Moore*, Asst. Atty. Gen., for appellees.

WILLIAMS, J. It is essential to determine whether the Corporation Commission had jurisdiction of this proceeding. The charge is that the appellants issued "free transportation to one W. L. Page, an employee of the O. K. Bus & Carriage (Transfer) Company, for the purpose of enabling said O. K. Bus & Trans-

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fer Company to receive an undue and unfair advantage of its competitors in the transfer of passengers and baggage in Oklahoma City; that, because of the issuance of this free pass, the O. K. Bus & Transfer Company solicits business from passengers on the train without any expense to the transfer company." The commission was requested to promulgate an order canceling said free transportation and requiring the appellants to collect the usual fare therefor. Appellants contend that the pass to the employee of the O. K. Bus & Transfer Company was issued that he might board the trains at some station near Oklahoma City and go through the same to check such baggage as might be desired by passengers thereon to be transferred, and to arrange for its transfer at Oklahoma City. The appellants state that the purpose in issuing this transportation was for the convenience of the passengers upon the trains, and, if the commission determines that such transportation should not be issued, the same will be canceled; that it would be impractical to grant free transportation to all transfer companies in Oklahoma City. On the theory that it was an unlawful discrimination against complainant, who is engaged in the transfer business at Oklahoma City, the commission ordered that the appellants "shall only issue passes to such baggage agents as are in fact the agents of defendant."

The appellants insist that the commission did not have jurisdiction of this proceeding. The commission is "charged with the duty of supervising, regulating and controlling all transportation * * * companies, doing business in this state in all matters relating to the performance of their public duties, and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies." Unless the appellants are permitted under the law to issue this transportation to such employee without the regular charge therefor, this would be a discrimination, and the commission is specially empowered "from time to time to prescribe and enforce against such companies * * * rules and regulations * * * as may be reasonable and just." Section 234, Williams' Ann. Const. Okla.; section 18 (1), art. 9, of the Constitution.

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It is urged by counsel that the appellants owe the public no duty to provide baggage agents for the purpose of arranging for the expeditious transfer of baggage from one depot to another. Bouvier's Law Dictionary defines "duty" to be "a human action which is exactly conformable to the laws which require us to obey them." Appellants, under the Constitution and laws of this state, are required to furnish transportation to all patrons without discrimination, and, were they not authorized by section 13 to furnish free transportation to baggage agents as they might voluntarily elect, this would constitute discrimination in charges for transportation.

Cosby v. Richmond, etc., Co., 23 Interst. Com. Com'n R. 72, relates to the contention that it was the carrier's duty to provide for the delivery of baggage after it was delivered at the depot, and has no application to the questions here under determination.

Newport News Light & Water Co. v. Peninsular Pure Water Co., 107 Va. 695, 59 S. E. 1099, is not in point. The Virginia Commission, which has substantially the same powers as ours, was given "power and authority * * * over corporations chartered or doing business in this (that) state, in the performance and discharge of their public duties"; but it was not intended to confer upon the commission jurisdiction to hear and determine cases against corporations, in which the matters in controversy related primarily to injuries to private property rights and only affected the public incidentally. The wrongs there alleged were that the appellee, without authority, and in violation of the statute law of the state relating to corporations, was proceeding to occupy with a system of water mains and pipes the same streets in said city already occupied by the Newport News Light & Water Company; it being contended that the pipes were being laid at a less distance from the outside of the pipes of the appellant, when paralleling and crossing the same, than was permitted by the statute of that state concerning public service corporations. It was held that the Virginia Corporation Commission had no jurisdiction of said matter.

Here the question involved is as to the charges for transportation; one transfer employee insisting that the railroad com-

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pany charged him the regular fare when the employee of another transfer company was given free fare. Clearly such would be a discrimination in the fixing of charges for transportation and not permissible without being specifically authorized by the Constitution or some statute passed pursuant thereto. The commission therefore had jurisdiction to determine the question as to the alleged discrimination.

Section 13 of article 9 of the Constitution (section 229, Williams' Ann. Const. Okla.) permits appellants to issue or give to baggage agents free transportation. A baggage agent may not be an employee of the railway company. Frequently the express messenger, who is the employee of the express company, acts in the capacity of baggage agent on the train; it being done for the express company, and the express company contracting with the railway company to perform that duty for it. If it was contemplated in said section 13 that the baggage agent should always be an employee of the railway company, then the use of the term in that section was surplusage, for railroad corporations are therein specifically permitted to issue or give "any free * * * ticket, free pass, or other free transportation * * * to its employees and their families." The term "baggage agents" is contained in the phrase "to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the railroad company or transportation company is interested, persons injured in wrecks, and physicians and nurses attending such persons." Obviously it was not contemplated that a baggage agent to whom the railroad corporation is permitted to issue free transportation is always to be an employee. For the appellants to issue this transportation to a transfer or baggage man in order that he may board the train a sufficient length of time before it reaches its destination in order that he may ascertain and check up the baggage that is to be transferred and to provide for its transfer immediately on the arrival of the train is in the interests of the traveling public. Frequently women, children, aged and infirm men travel without attendants, and if it were necessary for them to await the arrival of the train at its destination before arrangements were made for the transfer of baggage, frequent delays and in-

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conveniences would arise. That such a practice may result in affecting one transfer company by diverting the transfer of passengers and baggage to another does not justify the commission in granting the relief sought, for section 13, of article 9 (section 229, Williams' Ann. Const. Okla.), *supra*, clearly authorizes the appellant to issue this free transportation.

It is urged that this might give the O. K. Bus & Transfer Company a monopoly of the transfer business, and they might charge the public excessive tolls for transfers. If the law does not already provide for the regulation and fixing of such charges, it may so provide, and within the sovereign power of the commonwealth there is sufficient refuge for the protection of every citizen.

It follows that the order of the commission is reversed, and this cause remanded, with instructions to dismiss the complaint.

HAYES and KANE, JJ., concur. TURNER, C. J., dissents as to the holding that the Commission had jurisdiction. DUNN, J., absent, and not participating.

STATE *ex rel.* WOOLRIDGE v. BOARD OF EDUCATION
OF OKLAHOMA CITY *et al.*

No. 4045. Opinion Filed November 26, 1912.

(128 Pac. 140.)

SCHOOLS AND SCHOOL DISTRICTS—Election of Board of Education—Liability for Expenses. A municipality under a charter form of government, framed by virtue of sections 3a and 3b, art. 18, of the Constitution, providing for a board of education and the election of the members thereof by virtue of the grant by the act of March 28, 1910 (section 1, c. 113, Sess. Laws 1910, p. 238), under sections 7 and 8, art. 1, c. 16, Sess. Laws 1909, at page 239, is liable for the expense of elections held to elect members of said school board.

(a) The board of education, under the existing statutes, is not liable for such expenses.

(Syllabus by the Court.)

Error from Superior Court, Oklahoma County;
E. D. Oldfield, Judge.

State ex rel. Woolridge v. Board of Education of Oklahoma City et al.

Action by the State, on the relation of R. A. Woolridge, against the Board of Education of the City of Oklahoma City and others. Judgment for defendants, and plaintiff brings error. Affirmed.

V. V. Hardcastle, Ross N. Lillard, George A. Matlack, and J. W. Johnson, for plaintiff in error.

Vaught & Ready, for defendants in error.

WILLIAMS, J. R. A. Woolridge, the relator herein, was appointed inspector of election in precinct No. 7 of ward No. 3 of the city of Oklahoma City by the county election board of Oklahoma county, and on April 2, 1912, performed his duty as such inspector in conducting an election in said precinct, in which members of said board of education and a treasurer thereof were elected for the ensuing term. The duties of said inspector were performed in accordance with the laws of the state. He alleges that he is legally entitled to receive as compensation therefor a certain sum, a claim for which has been duly made and certified.

Oklahoma City previously adopted a charter form of government under the powers contained in sections 3a and 3b of article 18 of the Constitution. Under the terms of this charter, no municipal officers were to be elected during the year 1912, but the county election board proceeded to hold, upon the date fixed by the charter for holding, the municipal elections to elect the members of the board of education of said city. The proceedings were regular and in accordance with the terms of said charter, and a full membership of said board were elected. In these elections voters throughout the entire district (part of which lies outside the city limits) participated.

The reason alleged for the election of the whole membership of the said board at said time was that no election had been held during 1911; and that the members whose terms had not expired the year before did so on the first Monday in May, 1912.

The city commissioners declined to pay the expenses of holding said election, on the ground that no law exists authorizing its payment. That is the question here for determination.

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By act March 28, 1910 (section 1, c. 113, Sess. Laws 1910, p. 238), it is provided:

"A separate ballot box for school purposes shall be provided by the city clerk, and ballots for school officers deposited therein. It shall be the duty of the city clerk to prepare suitable places for holding such elections. At such annual election there shall be a board of education, consisting of one member from each ward elected by the qualified voters thereof, who shall hold his office for a term of two years and until his successor is elected and qualified; provided, that no member of the board of education shall be a member of the council, nor shall any member of the council be a member of the board of education; provided, further, that the officers and members of boards of education in cities of the first class shall hold their offices for the full term to which they were elected; and provided, further, that in cities within the state of Oklahoma, which have heretofore adopted, or may hereafter adopt, a charter form of government, such cities shall have the power of fixing the number of members of their board of education, and their terms of office, and may, subject to the Constitution and general laws of the state, regulate the time and manner of the election of the members of the board of education, and their terms of office, within such charter cities, and shall further have power, if there be any territory outside the corporate limits of such city, to attach for voting purpose such territory to an adjoining voting precinct of an adjoining ward of such city."

This act was sustained by this court in *Cotteral et al. v. Barker et al.*, 34 Okla. 533, 126 Pac. 211.

The city clerk is required to provide a separate ballot box and ballots for the election of school officers, and to prepare suitable places for holding such elections. At the annual municipal election the board of education, consisting of one member from each ward, who shall hold office for a term of two years, with a proviso that in cities which adopt a charter form of government such cities have the power of fixing the number of members of their board of education and their terms of office, must be elected. No provision is made by statute for the payment by the school board of the expenses of holding such election.

Sections 7 and 8 of article 1 of chapter 16, Sess. Laws 1909, provide that the members of the precinct election board shall be allowed \$2.50 each for holding and conducting a municipal elec-

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tion, same to be paid by their respective towns or cities; and that official counters shall be chosen for cities of the first class as in general elections, who shall perform in such cities, for all elections thereunder, the duties imposed upon official counters for general elections, to be paid \$2 each for the performance of the respective duties in each election. Sess. Laws 1909, p. 239; *Erwin v. Wheeler*, 31 Okla. 331, 120 Pac. 1098.

We conclude that the school board is not liable for the expenses of holding this election, but that the city is.

The judgment of the lower court will be affirmed.

All the Justices concur.

NYE v. JONES *et ux.*

No. 4205. Opinion Filed November 26, 1912.

(128 Pac. 112.)

APPEAL AND ERROR—Death of Party—Dismissal. Proceedings in error will be dismissed where, at the expiration of the statutory period for the institution of proceedings in error, it appears from the record that intermediate to final judgment and the filing of proceedings in error in this court a party to the judgment sought to be reversed died, and no order of revivor of the judgment in her favor appears in the record.

(Syllabus by the Court.)

Error from District Court, Okfuskee County;
John Carruthers, Judge.

Action by Henry C. Jones and Malissa Jones against Luther A. Nye. Judgment for plaintiffs, and defendant brings error. Dismissed.

C. T. Huddleston, for plaintiff in error.

Wells & Lee, for defendants in error.

TURNER, C. J. On September 6, 1910, Henry C. Jones and Malissa Jones, his wife, sued Luther A. Nye, plaintiff in error, in the district court of Okfuskee county in damages for \$3,000

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for the breach of a written contract to convey them a certain piece of land in Pottawatomie county. After issue joined there was trial to a jury, and judgment for plaintiffs for \$1,800 damages was rendered and entered October 11, 1911, and defendant seeks to bring the case here.

On May 15, 1912, pursuant to time granted by the court, a case-made purports to have been served on the "attorneys for plaintiffs," and on July 20, 1912, the same, with petition in error thereto attached, was filed in this court, and summons in error duly served on Malissa Jones only, for the reason that intermediate the judgment and the filing of petition in error and case-made in this court, to wit, on February 20, 1912, Henry C. Jones died, leaving him surviving heirs at law. On March 7, 1912, Malissa Jones was appointed and duly qualified as administratrix of Henry C. Jones in the county court of Lincoln county.

As no order of revivor of the judgment appears of record to have been granted by the trial court in the name of the administratrix of Henry C. Jones, and as the statutory time for instituting proceedings in error has expired, the motion to dismiss for want of a necessary party should be sustained. In *Skilern et al. v. Jameson et al.*, 29 Okla. 84, 116 Pac. 193, the syllabus provides:

"Proceedings in error will be dismissed where, at the expiration of the statutory period for the institution of proceedings in error, it appears from the record that intermediate to final judgment and the filing of proceedings in error in this court a party to the judgment sought to be reversed died, and no order of revivor of the judgment in her favor appears in the record."

See, also, *Am. Nat. Bk. et al. v. Mergenthaler, etc., Co.*, 31 Okla. 533, 122 Pac. 507, *Kilgore v. Yarnell*, 24 Okla. 525, 103 Pac. 698, *St. L. & S. F. Ry. Co. v. Nelson*, 31 Okla. 51, 119 Pac. 625, and *Lee May v. Fitzpatrick*, ante, 127 Pac. 702.

For the reasons stated, this proceeding is dismissed.

All the Justices concur.

THE
SUPREME COURT,

STATE OF OKLAHOMA

DECEMBER TERM, 1912

PRESENT:

JOHN B. TURNER, CHIEF JUSTICE.
SAMUEL W. HAYES, VICE CHIEF JUSTICE.
R. L. WILLIAMS, }
MATTHEW J. KANE, } JUSTICES.
JESSE J. DUNN, }

KINGKADE v. CONTINENTAL CASUALTY CO.

No. 1258. Opinion Filed December 3, 1912.

(128 Pac. 683.)

INSURANCE—Health Insurance—Construction of Policy. A health insurance contract provided for the payment of indemnity in event the assured under certain specified conditions suffered from any of the diseases enumerated therein. The contract was so conditioned that it did not cover disability occasioned by or resulting from any chronic disease or diseases other than in acute and fully developed form. **Held**, that the assured, being afflicted with chronic nephritis, was not entitled to recover thereunder.

(Syllabus by the Court.)

Williams and Kane, JJ., dissenting.

*Error from District Court, Cleveland County;
R. McMillan, Judge.*

Action by Andrew Kingkade against the Continental Casualty Company. Judgment for defendant, and plaintiff brings error. Affirmed.

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Newell & Jackson, for plaintiff in error.

Manton Maverick, Edwin H. Manning, and Charles H. Woods, for defendant in error.

DUNN, J. This case presents error from the district court of Cleveland county. The sole question involved is whether, under a health rider to an accident policy, the plaintiff in error can recover on the contract for and on account of being afflicted with chronic nephritis. The lower court rendered judgment against him, and he has brought the case to this court for review.

The specific provisions of the policy necessary for us to notice are as follows:

"In consideration of the warranties and agreements contained in the application for the policy to which this rider is attached, and in further consideration of the payment of premium as provided in such application, hereby promises to pay to the insured, subject to the conditions hereinafter specified, a weekly sickness indemnity of twenty-five dollars, as follows:

"(A) In the event that the insured, while the policy is in force, and after it has been in full force and effect without delinquency in the payment of premium for not less than fifteen days, shall be ill from typhoid fever, typhus fever, scarlet fever, yellow fever, tetanus, mumps, varicella, smallpox, varioloid, diphtheria, enteritis, cholera morbus, colitis, typhilitis, pneumonia, pleurisy, peritonitis, epilepsy, locomotor ataxia, nephritis, scarlatina, erysipelas, appendicitis, apoplexy, diabetes, lipoma, sarcoma, asteoma, epithelioma, boils, renal calculi (gravel), cancer, measles, asiatic cholera, acute meningitis or cerebro-spinal meningitis, and thereby be wholly and continuously disabled and prevented from engaging in any labor or occupation, the company will pay said weekly indemnity for such period of time, not exceeding twenty-six weeks, as the insured, by reason of such illness and independently of all other causes, shall be confined strictly within the house, and there be regularly visited by a legally qualified physician. * * * This rider is attached to policy No. 763480 and forms a part thereof, and is subject to the conditions of said policy. This rider does not cover any disability occasioned by or resulting from any surgical operation unless the same is made necessary by any one of the above-named diseases, and takes place within ninety days from the beginning thereof; nor does this rider cover disability occasioned by or resulting from any

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chronic disease, or any disease in other than acute and fully developed form. * * *

It is the contention of plaintiff in error that by reason that the disease of meningitis which is named in the policy is denominated "acute meningitis," and that the word "acute" is not used with reference to the word nephritis, therefore it was the intention of the company to insure him against nephritis in any of its forms, either acute, chronic, or otherwise, or, if this intention was not clearly manifested by the contract, that there was such an ambiguity therein that under the operation of the uniform doctrine of where a policy is reasonably susceptible of two constructions, the one is to be adopted which is most favorable to the assured, and also that as the policy should be construed as the promisee understood it, he ought to prevail. The rule thus stated and the claim made is without doubt sound, and is to be applied in all cases where the insurance contract is ambiguous or uncertain, but in our judgment it is not applicable in the present case. The correct rule for the construction of a written instrument is laid down by the Supreme Court of the United States in the case of *Board of County Commissioners of County of Lake v. Rollins*, 130 U. S. 662, 9 Sup. Ct. 651, 32 L. Ed. 1060, wherein Justice Lamar, who prepared the opinion in that case, said:

"To get at the thought or meaning expressed in a statute, a contract, or a Constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning, which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the Legislature have the right to add to it or take from it"—citing authorities.

Our statute, announcing the common law on this subject, likewise lays down certain rules for the construction of contracts, and section 1097, Comp. Laws 1909, requires their application for the purpose of ascertaining the intention of the parties to a contract. Section 1098, *Id.*, reads:

"The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."

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Section 1101, *Id.*, provides:

"The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the others."

Looking, therefore, to the language of the contract before us, we find that the payment promised by the company to the insured in the event he was ill from any of the diseases named was in the first paragraph made "subject to the conditions hereinafter specified." One of the specified conditions was that it did not cover any disability occasioned by or resulting from any chronic disease or any disease in other than acute or fully developed form. Now, if the whole of the contract is to be taken together and effect given to every part thereof, as required by the common law, as well as by our statute, it seems clear that one suffering from any one of the diseases mentioned that was chronic was not within the intention of the parties to this contract. In order to allow plaintiff to recover, it would be necessary to run the judicial pen through this plain, unambiguous, controlling, and limiting provision agreed upon by the parties, and make an entirely different contract for them than the one into which they entered. If chronic nephritis could be recovered for, then every other of the diseases mentioned, although chronic, with the exception of acute meningitis, might likewise, if such a form could be developed, be recovered for.

In a lengthy pact of this character every condition cannot be inserted in the first line, nor perhaps in the first paragraph; but it would require something more than putting a controlling provision of the character here involved in a later paragraph to authorize us to eliminate it and hold that a health insurance company was engaged in the business of indemnifying people afflicted with chronic diseases against being sick.

It is said in the case of *Merrill v. Travelers' Insurance Company*, 91 Wis. 329, 64 N. W. 1039, that:

"Policies of insurance are framed probably with greater care and stricter attention to the language employed than almost any other kind of contracts, and each sentence, phrase, and word has an appropriate office and definite meaning. The rule of construction is that some particular operation, effect, and meaning must be assigned to each sentence, phrase, and word used, and when

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this may fairly and properly be done, no part of the language used can be rejected as superfluous or unmeaning."

Referring to this rule, in the syllabus it is said:

"The rule that, where reasonably intelligent men would honestly differ as to the meaning of the policy, the doubt should be resolved against the insurer, cannot apply where the doubt is raised by disregarding the foregoing rule of construction."

Other authorities supporting this same proposition may be noted as follows: *General Accident Ins. Co. v. Hayes*, 52 Tex. Civ. App. 272, 113 S. W. 990; *Standard Life & Accident Ins. Co. v. McNulty*, 157 Fed. 224, 85 C. C. A. 22; *Duran v. Standard Life & Accident Ins. Co.*, 63 Vt. 437, 22 Atl. 530, 13 L. R. A. 637, 25 Am. St. Rep. 773; *Johnson v. Dominion of Canada Guaranty & Accident Ins. Co.*, 12 Ont. Weekly Rep. 980.

Giving effect, therefore, to all of the provisions of the policy, requires us to hold that one with such a contract and suffering from chronic nephritis could not recover, and this holding on our part requires the affirmance of the judgment of the trial court.

TURNER, C. J., and HAYES, J., concur; WILLIAMS and KANE, JJ., dissent.

HERMAN CONST. CO. v. WOOD.

No. 1497. Opinion Filed December 3, 1912.

(128 Pac. 309.)

1. **ATTORNEY AND CLIENT—Contingent Fee—Lien.** By reason of act of the Legislature, entitled "An act to provide for attorney's liens upon a client's cause of action," etc., approved March 4, 1909 (Sess. Laws 1909, p. 117), a client may contract with his attorney to pay his attorney a percentage or portion of the proceeds of his cause of action, not to exceed 50 per centum of the net amount of such judgment as may be recovered or such compromise as may be made with the consent of his attorney; and, where such contract is made, the client may not, without notice to and consent of his attorney, compromise his cause of action with the adverse litigant so as to bind the attorney in the amount of fee he is to receive or to affect or abrogate his lien therefor.
2. **SAME—Settlement by Client—Rights of Attorney.** Where such a contract between attorney and client has been made and a set-

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tlement or compromise of the cause of action by the client and adverse litigant had without notice to and consent of the attorney, the attorney within one year after he becomes aware of such compromise may prosecute a separate suit against the adverse litigant for the fee due him or that would have become due him under his contract of employment, if the cause had been prosecuted to judgment, not to exceed the percentage of the amount to be sued for as stipulated in his contract; and, at the trial of such action, the attorney may introduce evidence to establish the merits of his client's cause of action and the amount he would have been entitled to receive, if same had been prosecuted to judgment.

(Syllabus by the Court.)

*Error from Superior Court, Muskogee County;
Farrar L. McCain, Judge.*

Action by Bert G. Wood against the Herman Construction Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Jas. S. Ross and H. M. Peck (A. Van R. Schermerhorn and James L. Powell, of counsel), for plaintiff in error.

Bert G. Wood, O. T. Gilbertson, Benjamin Martin and Moss, Turner & McInnis, for defendant in error.

S. T. Bledsoe, amicus curiae.

HAYES, J. This case involves the construction and validity of an act of the Legislature of 1909 (Sess. Laws 1909, c. 4), commonly known as the Attorney's Lien Statute. Since a construction of the entire statute is necessary to the construction of those portions of it directly involved in this proceeding, we feel justified in setting out the entire statute, which is as follows:

"An act to provide for attorneys' liens upon a client's cause of action, authorizing contracts between attorneys and clients, and providing for the enforcement of such liens.

"Be it enacted by the people of the state of Oklahoma:

"Section 1. From the commencement of an action at law or equity or from the filing of an answer containing a counterclaim, the attorney or attorneys who represent the party in whose behalf such pleading is filed shall have a lien upon his client's cause of action or counterclaim, and same shall attach to any verdict, report, decision, finding or judgment in his client's favor, and the proceeds thereof, wherever found, shall be subject to such lien and no settlement between the parties without the approval

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of the attorney shall affect or destroy such lien. Such lien shall attach from and after such attorney is contracted with, provided such attorney serves notice upon the defendant or defendants, or proposed defendant or defendants, in which he shall set forth the nature of the lien he claims and extent thereof, or from and after the service of such notice. Such notice shall not be necessary, provided such attorney has filed such pleading in a court of record, and indorsed thereon his name, together with the words 'lien claim.'

"Sec. 2. It shall be lawful for attorneys to contract for a percentage or portion of the proceeds of a client's cause of action or claim, not to exceed 50 per centum of the net amount of such judgment as may be recovered, or such compromise as may be made with the consent of the attorney, whether the same arise *ex contractu* or *ex delicto*, and no compromise or settlement entered into by a client without such attorney's consent, shall affect or abrogate the lien provided for in section 1 hereof, which lien shall apply to all contracts mentioned in section 2 hereof.

"Sec. 3. Should the party to any action or proposed action, whose interest is adverse to the client contracting with an attorney, settle or compromise the cause of action or claim wherein is involved any lien, as mentioned in the preceding section hereof, without the attorney having notice and an opportunity to be present at such settlement, such adverse party shall thereupon become liable to such attorney for the fee due him or to become due under his contract of employment, and such attorney may enforce any lien provided for by this act in any court of competent jurisdiction by action filed within one year after he becomes aware of such compromise.

"Sec. 4. Should the amount of the attorney's fee be agreed upon in the contract of employment, then such attorney's lien and cause of action against such adverse party shall be for the amount so agreed upon. If the fee be not fixed by contract, the lien and cause of action, as aforesaid, shall be for a reasonable amount for not only the services actually rendered by such attorney, but for a sum, which it might be reasonably supposed, would have been earned by him had he been permitted to complete his contract; and such attorney may present, upon the hearing, the facts essential to establish the merits of the cause in which he was employed. Should the contract be for a contingent fee and specify the amount for which action is to be filed, then the lien and cause of action as aforesaid shall be for the percentage of the amount to be sued for, as mentioned in said contract.

"Approved March 4, 1909."

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The facts out of which this case grows are: That in July, 1908, one W. S. Acy, while in the employment of plaintiff in error, hereinafter referred to as defendant, and while engaged in constructing a sewer ditch in the city of Muskogee, was injured by falling off one of defendant's scaffolds used in constructing the sewer ditch. On the 5th day of August, 1909, defendant in error, hereinafter called plaintiff, as attorney of W. S. Acy, brought a suit in behalf of Acy in the superior court of Muskogee county against defendant for the sum of \$5,000 damages for injuries alleged to have been sustained by Acy in said accident. Thereafter Acy settled and dismissed his suit with prejudice on the payment to him of \$125 by an agent of a casualty company which had insured defendant against all legal liability for damages on account of personal injuries sustained by its employees. Subsequently, on the 8th day of September, 1909, plaintiff filed this suit against defendant to recover the sum of \$2,500 and to enforce his alleged attorney's lien for that amount on Acy's cause of action. In addition to alleging substantially the foregoing facts, plaintiff further alleged that, before filing the suit on behalf of Acy, he had entered into a contract with Acy to bring the suit against the defendant for \$5,000 damages, with a stipulation in the contract that he should receive for his services as attorney 50 per cent. of the amount recovered by judgment, or by compromise made with his (plaintiff's) consent, and that claim of lien was indorsed upon his petition. He alleged that the settlement made with Acy was made without plaintiff's consent and without notice to him or opportunity to be present. He later amended his petition, so as to pray for judgment only in the sum of \$1,995.

After defendant had filed a demurrer and answer to the amended petition, there was a trial to the court without a jury, who found the facts for plaintiff and rendered judgment in his favor for the sum prayed for. All the questions of law presented by this appeal are raised by defendant's demurrer to plaintiff's petition, which the trial court overruled, and those questions are: First, what cause of action and lien does the statute give plaintiff against defendant? Second, is the statute valid?

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A construction of the statute presents some difficulty. Plaintiff now contends, and contended before the trial court, that, when he established that he had a contract with Acy by which he was to receive 50 per centum of the net amount of such judgment as might be recovered or such compromise as might be made with plaintiff's consent, that suit had been filed and a notice of the lien given and a compromise thereafter made by defendant with Acy without the consent of plaintiff or notice to him thereof, the last sentence of section 4 operated to create a fixed liability against defendant in favor of plaintiff for 50 per centum of the amount for which the suit was brought, being the same amount named in his contract with Acy. The judgment of the trial court sustains this contention; but we are of the opinion that such is not the effect of the last sentence of section 4, when construed with the other provisions of the act, which must be done. That sentence reads as follows:

"Should the contract be for a contingent fee and specify the amount for which the action is to be filed, then the lien and cause of action as aforesaid shall be for the percentage of the amount to be sued for as mentioned in said contract."

This sentence by its own terms shows that it is to be construed in connection with the preceding provisions of the statute, for reference to preceding provisions is twice made in the sentence, in that it speaks of the "lien and cause of action as aforesaid," and specifies that the recovery shall be "for the percentage of the amount to be sued for as mentioned in said contract." "Aforesaid lien and cause of action" refers to the lien and cause of action created by the preceding sections of the statute; and "the percentage of the amount to be sued for, as mentioned in said contract," refers to that portion of the statute authorizing contracts for contingent fees and limiting the percentage for which such contracts may be made. Section 1 of the act creates a lien in favor of the attorney upon the cause of action from the commencement of any action at law or in equity or from the filing of an answer containing a counterclaim, and this lien passes over and attaches to the verdict, report, decision, finding, or judgment in favor of the attorney's client and the proceeds thereof, wherever found, and no settlement between the party without the

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approval of the attorney affects or destroys such lien. The counterpart of this provision of the statute as contained in the first sentence of the section is to be found in the statute of other states, notably in Missouri and New York, where such statute has been construed to give the attorney a lien upon his client's cause of action, which follows and attaches to any settlement made by his client as well as to any judgment that may be rendered in the cause; but that such provision does not prevent the client from settling without the consent of his attorney, and any settlement made by him in good faith binds his attorney as to the amount of compensation the attorney is to receive under his contract, but does not affect the attorney's lien upon such settlement to secure the payment of his fee. *O'Connor v. St. Louis Transit Co.*, 198 Mo. 622, 97 S. W. 150, 115 Am. St. Rep. 495, 8 Ann. Cas. 703; *Taylor et al. v. St. L. Transit Co.*, 198 Mo. 715, 97 S. W. 155; *Peri v. N. Y. Cent. & Hud. Ry. Co.*, 152 N. Y. 521, 46 N. E. 849; *Carl Fisher-Hansen v. Brooklyn Heights Ry. Co.*, 173 N. Y. 492, 66 N. E. 395. See, also, *Railway Co. v. Wells*, 104 Tenn. 706, 59 S. W. 1041.

The second and third sentences of section 1 have no bearing upon the extent of the lien created or the attorney's rights thereunder, except to provide that the lien may attach at any time after contract is made with the litigant and before suit, provided the attorney serves notice upon the defendant, setting forth the nature of the lien he claims and the extent thereof. Without such notice, the lien attaches upon commencement of the action, if the attorney indorses upon his pleading his name, together with the words "lien claim."

Section 2 authorizes attorneys and litigants to enter into contracts of employment by which attorneys are to be paid a contingent fee. The maximum amount of the fee contracted for shall not exceed 50 per centum "of the net amount of such judgment as may be recovered or such compromise as may be made with the consent of the attorney." It is to be observed that this section does not authorize a contract for a per centum of the amount to be sued for. The latter part of this section makes the lien provided for by section 1 attach and follow fees con-

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tracted for under section 2, and also provides that no compromise or settlement, entered into by a client without his attorney's consent, shall affect or abrogate such lien. If this section had provided only that an attorney may contract for a percentage of the judgment recovered in any action, we should hold, in harmony with the decisions of other courts construing similar statutes, that the statute being a remedial one should be liberally construed; and that the rights of the attorney to his fees and his lien to secure same would attach to any settlement made before judgment, but his client could settle without his consent and by such settlement fix in accordance with the percentage of the contract the amount of the attorney's fee; but the legislators of this state have added the additional clause or of "such compromise as may be made with the consent of the attorney." This clause intended to add something to the force of the statutes as generally found in other states, and does, we think, authorize the attorney to contract for a contingent fee and to secure the payment of same gives him a lien upon his client's cause of action, and the amount of such fee is to be determined by the percentage of the judgment finally secured or of a compromise which is made with his consent; and any compromise made without his consent shall not operate to determine the amount of his fee or to destroy his lien upon the cause of action to secure the payment of the same. This construction of the section is supported not only by the language of the section, but by the language of the subsequent sections of the act. The provisions of section 3 by specific language therein are made to apply to contracts made under section 2. Under that section when a settlement is made by a defendant with a plaintiff, without notice to plaintiff's attorney and opportunity to be present and without his consent, the defendant thereupon becomes liable to such attorney "for the fee due him or to become due him under his contract of employment." What is the fee due him, or to become due him under his contract of employment made under section 2 of the act? It is a fee for a stipulated per centum of the judgment or "of compromise as made with the consent of the attorney." There having been no compromise with the consent of the attorney, but one made without his con-

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sent, the attorney's right of action is for the fee measured by the stipulated percentage of the judgment his client was entitled to recover; and the last clause of section 3 provides a procedure for the recovery of such fee by authorizing the attorney to prosecute in any court of competent jurisdiction an action filed within one year after he becomes aware of such compromise for the collection of such fee and enforcement of the lien to secure the same.

Section 4 continues to outline the procedure that an attorney is authorized to pursue for recovery of his fee when a settlement has been made without his consent. The first sentence provides for those cases in which the contract between attorney and client is for a specified sum. The second sentence provides for those cases in which there is no agreement as to the fee, and the third and last sentence as to contracts stipulating for a contingent fee. If the last sentence be construed as plaintiff contends for, then it will be in conflict with the provisions both of section 2 and of section 3; for section 3 provides that an attorney serving for a contingent fee, where settlement has been made without his consent, may bring his action to enforce his lien for the sum due him or to become due him under his contract, which, in this case, is 50 per centum of any judgment obtained. Again, such literal construction renders said sentence in conflict with section 2 and of doubtful meaning, if not impossible application, because it provides that the lien and cause of action "shall be for the percentage of the amount to be sued for as mentioned in said contract," contemplating under plaintiff's construction that the contract provides for a percentage of the amount sued for; but section 2 does not authorize such a contract and authorizes a contract only for a percentage of the judgment recovered or compromise made with the attorney's consent. The intention of the lawmakers by this section, we think, was to provide as to this class of contracts, in connection with said section 3, that the attorney, where settlement has been made without his consent, may bring his action against the adverse litigant for an amount not to exceed the percentage of the amount sued for and recover to the extent only that he may show upon the trial his client was

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entitled to recover; and, for the purpose of enforcing his lien, he may in a suit therefor produce evidence as to the merits of his client's cause of action and to establish the amount to which he was entitled to recover, and therefrom ascertain the fee the attorney would have been entitled to receive and would have become due under his contract, had the cause been prosecuted to final judgment, and thereby secure judgment against the adverse litigant for such sum.

That such procedure is contemplated by the statute is indicated by the provisions of section 3 that the attorney's cause of action and lien shall be for the fee due him, or "to become due him under his contract of employment." The second sentence of section 4 distinctly authorizes such a procedure, where there is no contract fixing the fee, in that it provides that "the attorney has his lien and cause of action for a reasonable amount for not only the actual service rendered by such attorney, but for a sum that might be reasonably supposed would have been earned by him had he been permitted to complete his contract"; and at the trial he may present the facts essential to establish the merits of his client's cause. Such a procedure is not entirely a novel one, for the enforcement and collection of an attorney's fee. Courts have, in the absence of any statute prescribing any such procedure and in the absence of any statute attempting to prevent the settlement by a litigant of his cause of action without consent of his attorney, so as to bind his attorney as well as himself, when a settlement has been made in collusion and fraud, prejudicing the attorney in the collection of his fee, permitted the settlement to be set aside and the attorney to prosecute his client's cause of action to judgment, in order to enforce the collection of his fee; or where, after a judgment has been obtained, a settlement of the judgment has been collusively and fraudulently made between the litigants for the purpose of cheating the attorney out of his fee, the courts have set aside such settlement and permitted the attorney to enforce the collection of his fee by an execution. *Cline Piano Co. v. Sherwood*, 57 Wash. 239, 106 Pac. 742; *Martin v. Smith et al.* (Ky.) 110 S. W. 413; *Falconio v. Larsen*, 31 Ore. 137, 48 Pac. 703, 37 L. R. A. 254; *Grand Rapids & I. Ry. Co. v.*

Cheboygan Circuit Judge, 161 Mich. 181, 126 N. W. 56, 137 Am. St. Rep. 495.

The statute under consideration has extended the foregoing rule so that when a settlement is made by a client of a cause of action on which his attorney has a lien and an interest therein to secure him compensation for his services, without consent of the attorney such settlement does not bind the attorney as to the amount of fee he shall receive, where the contract is for a contingent percentage of the judgment recovered or of settlement with the attorney's consent; but such attorney may prosecute a separate action against the adverse litigant who has settled with notice of the attorney's interest to recover as his fee the sum that he would have received had the action of his client proceeded to final judgment; and in so doing he may establish the merits of his client's cause of action. The change this statute effects, so far as we know, is not to be found in the statute of any other state, and is subject to the criticism of being novel that has been made by counsel; but legal history discloses that the development of the law has been attended by several changes in the law regarding fees of attorneys. In early times an attorney could not charge a fee, and was dependent for compensation for his services upon the gratuity of his client. This rule was modified to the extent that the court charged as costs in the case a fee for the prevailing party, known as attorney's fee, which in fact was for the benefit of the client's attorney. Later the law permitted attorney and client to contract for a fee and stipulate the amount thereof, but did not permit contingent fees, and fees made dependent upon the success of litigation were declared void as against public policy; but in many of the states of the American Union this rule has been changed by statute, and in some of the states such contracts are permitted in the absence of statute until now reason could be found to sustain such contracts in the absence of a statute as not being any longer against public policy; but the statute here involved specifically provides for a contingent fee, and upon the foregoing question we need not pass.

Nor is the statute to be declared invalid because in violation of public policy, as contended for by plaintiff in error. Contracts

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are struck down by the courts when they are found to be in contravention of public policy; but statutes may not, under the weight of authority, be invalid for such reason. The public policy of a state is determined by its Constitution, its statutes, and the decisions of its courts. The statutes in the main make the public policy of the state. The wisdom or lack of wisdom of any policy is for legislative determination, over which the courts have no jurisdiction, except in so far as any statute violates a constitutional provision.

In *Railway Co. v. Wells*, *supra*, the statute under consideration was in some respects similar to the one here involved. In answer to the contention that it was invalid because it tended to encourage litigation and prevented a defending litigant from purchasing his peace, the court said:

"Whether it tends to encourage litigation, and thereby violates sound public policy, the court is not prepared to say; nor, indeed, is it allowable for the court to consider that question as in any manner affecting the constitutionality of the act. Under the organic division of the functions of government, the policy or impolicy of a given act is a matter for the final decision of the General Assembly as an essential part of its exclusive power of legislation, and the judiciary is precluded from entering that domain."

Unless the statute violates some express provision of the Constitution, it must be valid. Section 85, Lewis' Sutherland, Statutory Const., and authorities there cited.

Nor does any reason appear to us upon which the statute should be held invalid, upon the ground that it takes the property of either the client or defendant without due process of law or denies to either of them the right to contract. The statute authorizes a person who has a cause of action against another to assign a valuable interest therein or lien upon it to secure an attorney for his compensation for services. In authorizing him to make such a contract, it also provides that, when such a contract has been made, he cannot thereafter act in a manner so as to affect the rights of the attorney without the attorney's consent. A defending litigant is not prevented from settling with a plaintiff as to such cause of action; but, in doing so, he must respect

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the right of plaintiff's counsel therein, and he cannot destroy or affect those rights. He settles with plaintiff with full notice of plaintiff's attorney's lien; he deals with it not differently than if he were purchasing from plaintiff a horse upon which the attorney has a lien and of which the defendant has notice. No contract they can make can affect the lien of attorney on the horse or the value of the horse for the purpose of enforcing that lien. We can understand, as has been stated by counsel for plaintiff in error, that this statute may hinder a defendant from purchasing his peace where unprofessional attorneys insist upon a settlement that the cause of action does not merit, and will enable such attorneys to oppress persons against whom actions without merit are brought; but this argument directs itself to the policy of the statute. As an answering argument thereto, which, no doubt, was in the minds of the legislators at the time of the enactment of this statute, the frequent practice of claim agents or some of them, by which they take advantage of the ignorance and poverty of litigants who have causes of action for damages to settle same in the absence of their attorneys and in ignorance of their full rights in the premises, is an equally reprehensible practice. Neither system as thus abused can be commended, and both are attended with evils. All these considerations, however, must be deemed to have been weighed by the Legislature, and it has to determine which of the two it regards the greater, and its action forecloses any judgment of this court thereon.

It follows, for the foregoing reasons, that the judgment of the trial court should be reversed, and the cause remanded for further proceedings in accordance with this opinion.

All the Justices concur.

City of Anadarko v. Argo.

CITY OF ANADARKO v. ARGO.

No. 2109. Opinion Filed December 3, 1912.

(128 Pac. 500.)

1. **APPEAL AND ERROR—Harmless Error.** The improper admission or rejection of evidence, if not prejudicial to the party complaining, is not ground for reversal.
2. **COMPROMISE AND SETTLEMENT — What Constitutes.** A "compromise" is an agreement between two or more persons, who, to avoid a lawsuit, amicably settle their differences upon such terms as they can agree upon.
3. **EVIDENCE — Admissions — Compromise.** Admissions made expressly for the purpose of effecting a compromise of a matter under controversy, if not accepted, cannot be proved against the party making them; but, where it does not appear that such admissions were made in confidence of a compromise, they will be admissible in evidence.

(Syllabus by the Court.)

Williams, J., dissenting.

Error from District Court, Caddo County;
Frank M. Bailey, Judge.

Action by Nellie Argo against the City of Anadarko. Judgment for plaintiff, and defendant brings error. Affirmed.

Bristow & McFadyen, for plaintiff in error.

Ballinger & Maxwell, for defendant in error.

KANE, J. This was an action for damages for personal injuries, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below. Upon trial to a jury there was a verdict in favor of the plaintiff, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

There are two assignments of error argued by counsel for plaintiff in error in their brief, both based upon the action of the court in admitting certain evidence. It seems that prior to the commencement of the action the plaintiff filed her claim with

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the city clerk, attaching thereto an affidavit, setting out in some detail the nature of the injuries sustained by her and the acts of negligence whereby they were inflicted. The court permitted this affidavit, together with the statement to which it was attached, to be admitted in evidence, at the same time stating to the jury that "this affidavit is simply read for the purpose of showing that the claim was presented to the authorities of the city of Anadarko for the alleged injuries in this case complained of." The objection to the introduction of this affidavit is to the effect that the statement of the nature of the injuries and how they occurred and the extent thereof contained therein tended to strengthen the plaintiff's own testimony on the same subject, and must therefore have had a prejudicial effect upon the minds of the jury. The court does not take that view of it. In the first place, we do not think the affidavit was inadmissible. The claim was filed in pursuance to section 703, Comp. Laws 1909, which provides that no costs shall be recovered against the city in any action brought against it for an unliquidated claim, unless the same has been presented to the city council to be audited. Claims against the city must be verified under oath, and it does not seem that the affidavit, which is in the nature of a verification, sets out the nature of the claim and the circumstances under which it arose in unnecessary detail. Taking this in connection with the instruction of the court in relation to its admission, and that the evidence of the plaintiff and several other witnesses upon that phase of the case, which was practically uncontradicted, shows the averments of the affidavit not to be as vivid and full as the facts justified, we do not see how any substantial right of the defendant could be affected thereby, even if the admission of the affidavit may have been technically objectionable.

"The rule is well established that the improper admission or rejection of evidence, if not prejudicial to the party complaining, is not ground for reversal." (*Mullen v. Thaxton*, 24 Okla. 643, 104 Pac. 359.)

The other objection has to do with the introduction of evidence pertaining to the action of the city upon the claim filed by the plaintiff. The record shows that the city council appointed a

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committee to investigate the matter, which committee, after full investigation, recommended the payment of \$275 in full payment of the claim. Counsel for plaintiff in error say: "This testimony we think clearly shows an offer of compromise and was prejudicial to the rights of the defendant." Again we disagree with counsel. The action of the city in the premises lacks many of the elements of a compromise. The claim was presented; a committee appointed to investigate and report; the committee found that the city was indebted to the plaintiff in the sum of \$275, and recommended the payment thereof; the report of the committee was accepted, and the committee discharged; and the city allowed the claim in the sum recommended. This amounted to no more than an admission on the part of the city of its liability to the plaintiff in the sum found by the committee. A "compromise" is an agreement between two or more persons, who, to avoid a lawsuit, amicably settle their differences upon such terms as they can agree upon. 6 Enc. of L. (2d Ed.) 418. There is a very marked distinction between an offer to compromise and admissions made without reservation or suggestion of compromise. 16 Cyc. 498. Admissions made expressly for the purpose of effecting a compromise of a matter under controversy, if not accepted, cannot be proved against the party making them; but, where it does not appear that such admissions were made in confidence of a compromise, they will be admissible in evidence. 1 Enc. of L. (2d Ed.) 714; *Campau et al. v. Dubois et al.*, 39 Mich. 274; *Kahn v. Traders' Ins. Co.*, 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47.

The judgment of the court below must be affirmed.

TURNER, C. J., and HAYES and DUNN, JJ., concur;
WILLIAMS, J., dissents.

St. Louis, I. M. & S. Ry. Co. v. Carlile.

ST. LOUIS, I. M. & S. RY. CO. v. CARLILE.

No. 2110. Opinion Filed December 3, 1912.

(128 Pac. 690.)

1. **WITNESSES—Knowledge—Testimony From Writing.** In an action by a shipper against the initial carrier for loss of a quantity of potatoes out of a car-load shipment that had to pass over a line of a connecting carrier in order to reach its destination, it was error to permit a witness who had no knowledge of the weight of the car when delivered to the connecting carrier, or when delivered to the consignee, and who had never been in the employment of the connecting carrier, and had been in no way connected with the execution of a purported waybill of the connecting carrier for said car of potatoes, to testify what the car of potatoes weighed when it was received by the connecting carrier, as shown by said purported waybill.
2. **CARRIERS—Connecting Carriers—Loss of Freight—Extent of Liability.** The shipment was made from a point in the Indian Territory to Chicago prior to the passage of act of Congress of June 29, 1906, c. 3591, sec. 7, 34 St. at L. 593 (U. S. Comp. St. Supp. 1911, p. 1304). Held that, in the absence of any agreement constituting the carriers partners or joint undertakers, and in the absence of any special agreement by the initial carrier assuming liability for the shipment over the entire route, the initial carrier was liable only for the loss or injury occurring on its own line.
3. **SAME—Presumption of Liability.** When, upon the shipment's being delivered, it was found that a part thereof had been lost, the presumption is that such loss occurred on the line of the delivering carrier; and there is no presumption that the loss occurred while the goods were in the hands of the initial carrier.

(Syllabus by the Court.)

Error from District Court, Sequoyah County;
John H. Pitchford, Judge.

Action by Thomas Carlile against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Lovick P. Miles and Vincent M. Miles, for plaintiff in error.

HAYES, J. Defendant in error, hereinafter called plaintiff, originally filed this action against plaintiff in error, herein-

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after called defendant, in the United States commissioners' court at Sallisaw, Indian Territory, where judgment by default was rendered and entered against defendant, from which judgment defendant prosecuted an appeal to the United States Court for the Northern District of the Indian Territory, where the same was pending at the time of the admission of the state, and was, by reason of the provisions of the Enabling Act and Schedule to the Constitution, transferred to the district court of Sequoyah county. The trial in that court to a jury resulted in a verdict and judgment in favor of plaintiff, to reverse which this appeal is prosecuted.

Plaintiff alleges in his petition filed in the United States commissioners' court that on June 14, 1906, he delivered to defendant 251 sacks of Irish potatoes, weighing 29,990 pounds, which were received by defendant into a Missouri Pacific car, No. 6119, at Illinois Station, Indian Territory, with the agreement that the same should be shipped and delivered to James Flood, Chicago, Ill. He alleges that defendant thereafter delivered to the consignee 22,000 pounds of said potatoes, but failed and refused to deliver the remainder thereof in the total amount of 7,990 pounds, and asked judgment for the value of the potatoes plaintiff failed to deliver at 70 cents per bushel, less freight thereon from Illinois Station, Ind. T., to Chicago.

At the trial in the court below the present agent of defendant at Illinois Station testified on behalf of plaintiff; and, refreshing his memory from the records in defendant's office at said station, he testified as to the receipt of the potatoes as alleged in plaintiff's petition. Thereupon counsel for plaintiff handed to him a waybill or expense bill, which the witness stated was a Wabash expense bill for said car 6119, M. O. P. He was thereupon asked if he could take said waybill and tell from it how many pounds of potatoes were delivered at Chicago. Over the objection of defendant, he was permitted to answer that the waybill showed only 22,000 pounds. This waybill was never introduced in evidence, but it is attached to the case-made as an exhibit. It bears the signature of no one, and is made upon the printed form of the Wabash Railroad Company, and purports to

be an account stated for charges on articles transported by said railroad company. The witness testifying did not claim to have written said waybill himself at the time of the shipment of the potatoes, or that he was in the employ of the Wabash Railroad Company at that time, and said record was not in the possession of the witness until handed him by counsel for plaintiff. Counsel for plaintiff testified that he came into possession of said waybill by receiving same attached to a letter written to him by defendant's claim agent. We know of no theory upon which the foregoing evidence objected to was admissible. If the contents of said waybill had been competent evidence, the bill itself would have been the best evidence. It did not constitute a record or memorandum prepared by the witness, and he could not therefore refer to it for the purpose of refreshing his memory; and, being without any personal knowledge of the matters it purports to contain, his testifying therefrom as to the number of pounds of potatoes delivered at Chicago constitutes hearsay testimony and was incompetent. Again, the evidence fails to establish the execution of said instrument by the Wabash Railroad Company or any of its agents; and if this had been done we think said waybill or its contents would not have been competent evidence, for the reason that the Wabash Railroad is not a party to this proceeding, and therefore the waybill could not be admitted as a statement against interest, and would constitute only the statement of a third person not under oath. Again, the instrument does not purport on its face to show the number of pounds of potatoes delivered to the consignee, but only the number of pounds on which both defendant and the Wabash Railroad Company charged freight. It shows that the Wabash Railroad Company charged freight on exactly the same number of sacks, to wit, 251, that were delivered to defendant by plaintiff at Illinois Station. The unreliability of this kind of evidence to establish the quantity of potatoes delivered is apparent, when considered in view of a practice of railway companies of furnishing cars to shippers of minimum weight capacity and charging thereon for such minimum weight of capacity, regardless of whether the cars are filled to that capacity or not, and in many instances charging

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for said minimum weight, although the weight of the goods placed therein is in excess of such minimum weight.

The foregoing evidence is all the evidence in the record tending to show either that the amount of the potatoes was not delivered to the consignee, or was not delivered by defendant railway company to its connecting carrier, the Wabash Railroad Company. The evidence establishes that defendant operates no line of railway into Chicago, but that the consignment of potatoes was billed to St. Louis, to be transported from that point to the consignee by the connecting carrier. Under this state of the record, a demurrer to the evidence should have been sustained.

This action occurred prior to the act of Congress of June 29, 1906, c. 3591, sec. 7, 34 St. at L. 593 (U. S. Comp. St. Supp. 1911, p. 1304), which makes the initial carrier liable for all loss of goods during transit, whether occurring on the line of the initial carrier or upon the line of the connecting carrier; and the provisions of said act, therefore, have no application. In the absence of such statute, the rule adopted in this jurisdiction, which appears to be supported by the weight of authority, is that, where property is delivered to a carrier consigned to a point beyond its line, and in order to reach the point of consignment must pass over several lines of connecting carriers, in the absence of any agreement constituting the carriers partners or joint undertakers, and in the absence of a special agreement, each carrier is liable only for the loss or injury occurring on its own line. *Church v. Atchison, T. & S. F. Ry. Co.*, 1 Okla. 44, 29 Pac. 530. See, also, *Hot Springs Railroad v. Trippe & Co.*, 42 Ark. 465, 48 Am. Rep. 65; *Faison v. Alabama & Vicksburg Ry. Co.*, 69 Miss. 569, 13 South. 37, 30 Am. St. Rep. 577; *Montgomery & W. P. R. Co. v. Moore*, 51 Ala. 394; 6 Cyc. 490.

When the goods shipped, upon reaching their destination, are found to be injured or some of them lost, the presumption is that such injury or loss occurred on the line of the delivering carrier; and there is no presumption that the injury or loss occurred while the goods were in the hands of the initial carrier. *Atchison, T. & S. F. Ry. Co. v. Rutherford et al.*, 29 Okla. 850, 120 Pac. 266; *St. Louis & S. F. Ry. Co. v. McGivney*, 19 Okla. 361, 91 Pac.

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693; *St. L., I. M. & S. Ry. Co. v. Coolidge*, 73 Ark. 112, 83 S. W. 333, 67 L. R. A. 555, 108 Am. St. Rep. 21, 3 Ann. Cas. 582; *St. Louis S. W. Ry. Co. v. Birdwell*, 72 Ark. 502, 82 S. W. 835.

Plaintiff having alleged and established by his evidence that the car of potatoes was delivered to a connecting carrier, who delivered same to the consignee, the burden was upon him to prove that not all the potatoes received by the initial carrier and placed in the car were delivered to the consignee, and that their loss occurred before delivery of the car by the initial carrier to the connecting carrier; and, as there is absence of any competent evidence in the record to establish this fact, a demurrer to plaintiff's evidence should have been sustained.

For the foregoing reasons, the judgment of the trial court is reversed and the cause remanded.

TURNER, C. J., and WILLIAMS and DUNN, JJ., concur;
KANE, J., not participating.

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No. 2118. Opinion Filed December 3, 1912.

(128 Pac. 702.)

COURTS—Mayor's Court—Appeal. The mayor's court of incorporated towns and cities of the Indian Territory was not continued in existence upon admission of the state into the Union; and an appeal attempted to be perfected from a judgment rendered in one of such courts before statehood by filing before the mayor of the town after the admission of the state an affidavit for appeal as prescribed by the statutes in force in the Indian Territory before the admission of the state was void, for the reason that the mayor was without jurisdiction or authority in the premises.

(Syllabus by the Court.)

*Error from District Court, Creek County;
W. L. Barnum, Judge.*

Action by J. M. Addle against J. M. Hillis. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

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Wm. L. Cheatham, for plaintiff in error.

Thompson & Smith, for defendant in error.

HAYES, J. This action was begun in the mayor's court of the incorporated town of Bristow, Ind. T., on the 28th day of October, 1907, by defendant in error to recover from plaintiff in error a sum of money evidenced by a duebill. The trial occurred in that court on the 15th day of November, 1907, just one day prior to statehood, and resulted in a judgment for plaintiff in error, defendant in the mayor's court. On the 2d day of December following, subsequent to the admission of the state, defendant in error, plaintiff in the mayor's court, filed his affidavit for appeal with the mayor of the town of Bristow. A transcript of the proceedings in the mayor's court was certified by the mayor, and the same was filed in the district court of Creek county after due notice of appeal as required by statute had been given. At the trial in the district court plaintiff in error filed his motion to dismiss the appeal, because the court was without jurisdiction to entertain such appeal, the same not having been properly taken. After the overruling of this motion to dismiss, the cause was tried, resulting in a judgment for defendant in error.

The only assignment of error that we need consider is the one which complains of the overruling of plaintiff in error's motion to dismiss. Mayors of incorporated cities and towns of the Indian Territory had, in addition to their other powers, jurisdiction in all civil cases arising within the corporate limits of such incorporated cities and towns, concurrent with United States commissioners in the Indian Territory. Section 5724, Ind. Ter. Ann. St. 1899. The United States commissioners for the Indian Territory were *ex-officio* justices of the peace, and in civil cases had the jurisdiction of justices of the peace of Arkansas, except in certain particulars, not necessary here to be noticed; and appeals from the final judgments of such commissioners, acting as justices of the peace, were taken in the manner provided for the taking of appeals from final judgments of justices of the peace under the provisions of chapter 91, Mansf. Dig. of Ark.

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(chapter 41, Ind. Ter. Ann. St. 1899). By this statute, any person being aggrieved by any judgment rendered by a United States commissioner, except certain judgments not necessary to be mentioned, appeal could be taken by the applicant or some person for him by filing with the United States commissioner an affidavit that the appeal was not taken for the purpose of delay, but that justice might be done, and such appeal was required to be taken within 30 days after the judgment was rendered. Section 2815, Ind. Ter. Ann. St. 1899. Upon the admission of the state into the Union, the mayors' courts of the Indian Territory, or the jurisdiction of mayors of the Indian Territory in civil cases, was not continued in force in this state; and such courts ceased to exist. Section 1 of the Schedule to the Constitution provides that:

"No existing rights, actions, suits, proceedings, contracts, or claims shall be affected by the change in the forms of government, but all shall continue as if no change in the forms of government had taken place."

It has been held frequently by this court that the trial and disposition of all cases pending at the time of the admission of the state into the Union are governed by the procedure in force applicable to such cases prior to the admission of the state, and that an appeal taken after statehood from a judgment rendered in courts of the Indian Territory prior to the admission of the state is governed as to the mode of taking such appeal by the statute in force in the Indian Territory. *Moberly v. Roth et al.*, 23 Okla. 856, 102 Pac. 182; *Parks v. City of Ada*, 24 Okla. 168, 103 Pac. 607; *Edwards v. Jewell et al.*, 24 Okla. 172, 104 Pac. 335. In order for defendant in error to have perfected an appeal from the judgment rendered in the mayor's court, it was necessary for him to file with the court to which the cause was transferred upon the admission of the state into the Union his affidavit for appeal. The mayor, upon the admission of the state, was without any authority or jurisdiction in the premises; and an affidavit of appeal filed with him and a certified transcript prepared by him for the purpose of appeal were nullities.

We do not here undertake to determine to what court upon the admission of the state the civil causes pending in the mayors'

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courts of the Indian Territory were transferred by reason of the provisions of the Enabling Act and the Schedule to the Constitution; for, whether such causes went to the district courts of the state, to the county courts, or to the justices of the peace courts, the appeal in this case in no event can be sustained, for the reason that the proceedings to perfect the appeal were taken in none of these courts.

The judgment of the trial court is reversed and the cause remanded, with directions to dismiss defendant in error's appeal.

TURNER, C. J., and WILLIAMS and DUNN, JJ., concur; KANE, J., not participating.

STARR *et al.* v. TENNANT.

No. 2130. Opinion Filed December 3, 1912.

(128 Pac. 733.)

JUDGMENT—Vacation—Grounds. Where a judgment has been entered upon stipulation of the parties to a proceeding, the court having jurisdiction, not only of the subject-matter, but also of the parties, and power to enter the judgment, the same will not thereafter, at the same term at which it was rendered, be set aside without a showing that some injustice has been done to the party against whom the judgment was rendered.

(Syllabus by the Court.)

Error from District Court, Craig County;
T. L. Brown, Judge.

Action by James F. Tennant against J. C. Starr and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Guy Patten, for plaintiffs in error.

WILLIAMS, J. On December 24, 1907, defendant in error, as plaintiff, sued the plaintiffs in error, as defendants, for the sum of \$3,265, damages accruing out of breach of contract as to title to a certain 60-acre tract of land. On December 10, 1908, the defendants filed separate answers. On October 25, 1910, the following stipulation was filed in said cause:

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"It is hereby stipulated and agreed by and between James F. Tennant, plaintiff, by his attorney, Wm. P. Thompson, and J. C. Starr, defendant, by his attorney, Guy Patten, that the above-entitled case be settled as follows: That the defendant, J. C. Starr, shall pay to the plaintiff, James F. Tennant, the sum of two thousand two hundred forty dollars, in consideration of which the said plaintiff shall make, execute and deliver to the said defendant a good and sufficient quitclaim deed for all his right, title and interest in and to the following described land, with all improvements thereon, to wit: * * * The payment of the above sum to the plaintiff by the defendant shall be in full satisfaction and settlement of all claims against the said defendant in the above-entitled action and for all improvements on the above-described land, and the plaintiff shall further settle and pay all incumbrances incurred by him on the above-described land. It is further agreed that the plaintiff shall settle with McCoy on account of clearing and improvements placed by him on said land. It is understood and agreed that the defendant, J. C. Starr, shall be given peaceable possession and quiet possession of the above-described land on January first, 1911. It is further understood and agreed that each of the parties to said action shall pay one-half of the costs therein. It is further agreed that the defendant, J. C. Starr, shall have seven days from the date hereof to make payment of the above-named sum of \$2,240.00. It is further agreed that the above-entitled case shall be settled and dismissed as between the parties to this stipulation under the terms and conditions of this stipulation.

"[Signed] WM. P. THOMPSON,

"Attorney for Plaintiff.

"GUY PATTEN,

"Attorney for Defendant."

On the 3d of November, 1910, the following judgment was entered:

"This cause came on to be heard upon the stipulation for settlement in the above-entitled cause on this the 3d day of November, 1910, plaintiff appearing by his attorney, William P. Thompson, and defendant, J. C. Starr, appearing by his attorney, Guy Patten, and it being shown to the court that the sum of \$2,240.00 agreed to be paid by J. C. Starr to the plaintiff in the cause, not having been paid as per the terms of the stipulation on file, and the plaintiff bringing into court a good and sufficient quitclaim deed for all his right, title and interest in and to the lands described in the stipulation, duly executed by himself and wife, and offering and tendering the same and making demand

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for the money, under the stipulation, and tendering the said quitclaim deed into court, it is hereby ordered, adjudged and decreed by the court that the defendant, J. C. Starr, pay to the plaintiff the said sum of \$2,240.00 and one-half of the costs in this cause on or before the 17th day of November, 1910, and that upon failure of the defendant, J. C. Starr, to pay over said amount to the plaintiff, under the terms of the stipulation, that execution issue therefor."

Neither were any objections made to the entering of said order, nor any exceptions saved thereto.

It is sought to review the action of the trial court in this proceeding by means of a transcript.

This court having jurisdiction, not only of the subject-matter, but also of the parties, had the power to enter the judgment of which complaint is made. It is not contended that the stipulation was entered into through fraud practiced, or on account of mistake or accident.

Section 5680, Comp. Laws 1909 (section 4344, Wilson's Rev. & Ann. St. 1903; section 4018, St. Okla. 1893), provides:

"The court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

No substantial right of the plaintiff in error, J. C. Starr, was affected by entering such judgment on said stipulation. *Williams v. Hirschfield*, 32 Okla. 598, 122 Pac. 539; *Aggers v. Bridges*, 31 Okla. 617, 122 Pac. 170; *St. Louis & S. F. R. Co. v. Rushing*, 31 Okla. 231, 120 Pac. 973; *Chicago, R. I. & P. Ry. Co. v. Bankers' National Bank*, 32 Okla. 290, 122 Pac. 499; *Mullen v. Thaxton*, 24 Okla. 643, 104 Pac. 359; Gray's Digest, sec. 473.

In *United States Construction Co. v. Armour Packing Co. et al.*, *post*, 128 Pac. 731, the following excerpt is quoted with approval:

"In *Alder et al. v. Van Kirk Land & Const. Co.*, 114 Ala. 551, 21 South. 490, 62 Am. St. Rep. 133, it is said: 'In the absence of fraud in its procurement, and between parties *sui juris*, who are competent to make the consent, not standing in confidential relations to each other, a judgment or decree of a court having

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jurisdiction of the subject-matter, rendered by consent of parties, though without any ascertainment by the court of the truth of the facts averred, is, according to the great weight of American authority, as binding and conclusive between the parties and their privies as if the suit had been an adversary one, and the conclusions embodied in the decree had been rendered upon controverted issues of fact and a due consideration thereof by the court.'"

The judgment recites that all parties were in court by their attorneys, and "it being shown to the court that the sum of \$2,240.00 agreed to be paid by J. C. Starr to the plaintiff in the cause, not having been paid as per the terms of the stipulation on file, and the plaintiff bringing into court a good and sufficient deed," etc.

The purported motion for new trial is not a part of the record brought up by a transcript. *Richardson et al. v. Beidleman et al.*, 33 Okla. 403, 470, 126 Pac. 818.

The trial court having jurisdiction of the subject-matter and the parties, and having the power to enter such judgment, and the attorney for the plaintiffs in error, in open court, joining in the stipulation and permitting the judgment to be entered without objection or exception, the same will not be disturbed here on review.

All the Justices concur.

TITLE GUARANTY & SURETY CO. v. SLINKER.

No. 2708. Opinion Filed December 3, 1912.

(128 Pac. 696.)

1. **APPEAL AND ERROR—Review—Scope—Assignments Not Supported by Authority.** Assignments of error presented by counsel in their brief or oral argument, if unsupported by authority, will not be noticed by the court, unless it is apparent without further research that they are well taken.
2. **CONTINUANCE—Grounds—Absence of Witness—Incompetent Evidence.** A motion for a continuance based upon the absence of a witness is properly overruled where the affidavit supporting

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the motion shows that the facts it is alleged the witness would prove if present would be incompetent for the purpose offered.

3. **GUARDIAN AND WARD—Guardian's Account—Settlement—Impeachment by Guardian.** A guardian will not be permitted to testify in a manner to impeach the final settlement of his guardianship accounts, regularly made by the county court.
4. **SAME—Guardian's Bond—Sureties—Final Settlement—Conclusiveness.** Sureties on a guardian's bond are, in the absence of fraud, concluded by the decree of the county court, duly entered on a hearing on an accounting, or final settlement, as to the amount of the principal's liability, although the sureties are not parties to the accounting.
5. **PLEADING—Answer—Effect.** Where a pleading styled an answer contains an allegation to the effect that the petition does not state facts sufficient to constitute a cause of action, coupled with allegations of facts constituting a defense, and thereafter a general denial by way of a reply is filed thereto, it was not error for the court below to disregard the allegations attacking the petition and require the parties to proceed to trial, when the case was reached for that purpose, upon the issues of fact joined by the petition, answer, and reply.
6. **GUARDIAN AND WARD—Settlement of Accounts—Revocation of Letters.** It is within the province of the county court to require guardians to settle the accounts of their wards, even after the letters of guardianship have been revoked.
7. **SAME—Guardian's Bond—Action by Minor.** A minor by his legal guardian may maintain an action on the official bond of a former guardian, although the bond, which was executed prior to statehood, was made payable to the United States of America.
8. **JUDGES—Disqualification—Interest.** Section 2012, Comp. Laws 1909, which provides that "no judge of any court of record shall set in any cause or proceeding in which he may be interested, or in the result of which he may be interested," does not preclude a county judge from acting in the matter of the settlement of a guardian's accounts whose letters of guardianship have been revoked because he acted as attorney for the guardian in the matter of his appointment.

(Syllabus by the Court.)

*Error from District Court, Bryan County;
Jas. R. Armstrong, Judge.*

Action by William Raymond Slinker, a minor, by his legal guardian, A. Neely, against the Title Guaranty & Surety Company. Judgment for plaintiff, and defendant brings error. Affirmed.

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Edward C. Griesel and Kyle & Newman, for plaintiff in error.

Chas. E. McPherrren, Chas. P. Abbott, and Chas B. Cochran, for defendant in error.

KANE, J. This was an action on the official bond of J. I. Slinker, guardian of William Raymond Slinker, a minor, upon which the Title Guaranty & Surety Company was surety. No service of summons was had upon the principal, for the reason that he could not be found in the county where the action was commenced, and upon trial to a jury there was a judgment against the Title Guaranty & Surety Company, to reverse which this proceeding in error was commenced.

Counsel for plaintiff in error present quite a number of contentions in their brief which are entirely unsupported by any authority, and, as it is not apparent to the court that any of them are well taken, we will not notice that class of assignments further, but will confine ourselves to propositions upon which authority is cited *pro* and *con*.

The first assignment of the latter class is to the effect that the court erred in overruling the motion for a continuance filed by the plaintiff in error. This motion was supported by affidavit, and was based upon the absence of J. I. Slinker, who, it seems, had departed from the state, and, as the affidavit states, was a resident of Ft. Worth, Tex. The affidavit supporting the motion was to the effect that the evidence of Slinker would tend to show that he did not owe the estate of his ward the sum found to be due him by the county court in a settlement had therein, after citation upon the guardian demanding him to make a settlement of his ward's affairs after he had been removed from office. Such evidence is incompetent and could not have been introduced if the witness had been present. It seems to be well settled that, under statutes similar to ours, a guardian will not be permitted to testify in a manner to impeach the final settlement of his guardianship accounts regularly made by the county court. *Graff v. Mesmer*, 52 Cal. 636; *Brodrib v. Brodrib et al.*, 56 Cal. 563; *Deegan v. Deegan et al.*, 22 Nev. 185, 37 Pac. 360, 58 Am. St.

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Rep. 742; *In re Wells' Estate and Guardianship*, 140 Cal. 349, 73 Pac. 1065.

This, in effect, was held by this court in the case of *Southern Surety Co. v. Burney et al.*, 34 Okla. 552, 126 Pac. 748, wherein it was held that:

"Sureties on a guardian's bond are, in the absence of fraud, concluded by the decree of the county court, duly entered on a hearing on an accounting, or final settlement, as to the amount of the principal's liability, although the sureties are not parties to the accounting."

On the above proposition, which is also directly involved in the case at bar, the foregoing case is decisive.

It seems that the pleading styled an answer filed by the defendant, besides containing facts constituting a defense, contained an allegation to the effect that the petition did not state facts sufficient to constitute a cause of action. After the answer was filed, plaintiff filed a general denial by way of reply. Thereafter counsel asked leave to argue separately the allegations of its answer, which amounted to a demurrer, which leave was denied by the court, which action constitutes another ground of error. There is no statutory authority for combining an allegation which amounts to a demurrer with facts constituting a defense. The answer in an action at law is for the purpose of stating defensive facts and a demurrer raises questions of law, and should be filed and disposed of before the answer is filed. In *Ryndak v. Seawell*, 13 Okla. 737, 76 Pac. 170, it was held:

"Where a demurrer and an answer are filed at the same time, the answer being filed before a decision is had upon the demurrer, and the petition in the case contains but one count or cause of action, the answer will be held to have superseded the demurrer, and the trial should proceed as though no demurrer had been filed."

In the instant case we think the court was justified in requiring the parties to proceed to trial, when the cause was reached for that purpose, upon the issues joined by the petition, answer, and reply, and treating the allegations of the answer attacking the petition as surplusage.

The next error is to the effect that the court erred in permitting defendant in error to admit in evidence the decree or

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settlement of the county court against J. I. Slinker, the guardian. This upon the theory that a citation requiring a guardian to appear and make his final account, after he has been removed as such guardian, although duly served, is of no binding force or effect. This contention is without merit. Section 13, art. 7, of the Constitution, provides that:

"The county court shall have the general jurisdiction of a probate court. It shall probate wills, appoint guardians of minors, idiots, lunatics, persons *non compos mentis*, and common drunkards; grant letters testamentary and of administration; settle accounts of executors, administrators and guardians; transact all business pertaining to the estates of deceased persons, minors, idiots, lunatics, persons *non compos mentis*, and common drunkards, including the sale, settlement, partition and distribution of the estates thereof."

Sections 4941, 4950, and 5522, Comp. Laws 1909, in terms confer the same authority.

In *Graff v. Mesmer*, *supra*, it was held:

"It is the peculiar province of the probate court to settle accounts of guardians; and, as we have seen, it has authority to do so even after the letters are revoked. The statute contemplates that its power in that respect shall be exclusive in those cases in which the necessary authority has been conferred, as in this case."

The plaintiff in error complains of the action of the court in admitting in evidence the guardian's bond sued on, for the reason that the same is made payable to the United States of America, whilst this suit is prosecuted in the name of the minor by his legal guardian. The bond was executed prior to statehood, and, under the law then in force, the bond was properly made payable to the United States.

In *Crowell et al. v. Ward*, 16 Kan. 60, which was an action on a guardian's bond, and identical with the case at bar, discussing the question as to whether the action should be brought in the name of the minor or in the name of the state of Kansas, the court says:

"Indeed, she must do so if she is the only party in interest. And for breaches of officers' bonds, executors' bonds, and administrators' bonds any person injured may sue in his or her own name, although such bonds are executed in the name of the state as obligee. * * * We would therefore expect to

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find by an examination of the laws that any person injured by a breach of a guardian's bond would have a right to sue therefor in his or her own name. Such a mode of procedure would certainly seem to come within the spirit of the laws of Kansas. The statutes do not define who shall be the obligee of a guardian's bond. They provide that 'guardians appointed to take charge of the property of a minor must give bond, with surety, to be approved by the court, in a penalty double the value of the personal estate, and of the rents and profits of the real estate of the minor, conditioned for the faithful discharge of their duties as such guardian, according to law.' * * * The bond in this case was executed in the name of the state as obligee. Such a bond, we think, is valid. But it might also be valid if it were executed in the name of the court, or the minor, or some one else, as obligee."

Other cases to the same effect are *Curry et al. v. Gilla County*, 6 Ariz. 48, 53 Pac. 4; *Kimball v. Bleick et al.*, 24 Ore. 59, 32 Pac. 766; *Heisen v. Smith et al.*, 138 Cal. 216, 71 Pac. 180, 94 Am. St. Rep. 39.

The last assignment is to the effect that the court erred in overruling the defendant's motion to set aside the judgment herein on the ground that the settlement of J. I. Slinker's guardianship accounts by the county court was void, for the reason that the county judge settling said accounts was disqualified to so act, in that he had represented the said J. I. Slinker as an attorney in securing his appointment many years prior to the date of the said accounting. The only evidence offered on this point was the order removing Mr. Slinker as guardian, which contains a recital that said judge was disqualified to sit in the hearing of the petition for said Slinker's removal, in that he had been of counsel in the matter of securing his appointment. We do not think that this evidence tends to connect the county judge with the accounts settled in such a manner as to disqualify him from acting in the matter of their settlement.

In the case of *State ex rel. McCormick v. Woody*, 14 Mont. 455, 36 Pac. 1043, it was held:

"A judge who had been attorney for an administratrix is not disqualified to try a proceeding brought by certain creditors of the estate to remove her, under section 547 of the Code of Civil Procedure, providing that a judge shall not act as such

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where he has been attorney for either party in the action or proceeding."

Other cases in point and to the same effect are *Karcher v. Pearce*, 14 Colo. 557, 24 Pac. 568; *Conyers v. Ford*, 111 Ga. 754, 36 S. E. 947; *Shoemaker v. South Bend Spark Arrester Co.*, 135 Ind. 471, 35 N. E. 280, 22 L. R. A. 332; *Glass v. Glass*, 127 Iowa, 646, 103 N. W. 1013; *Stewart v. Mix, Sheriff*, 30 La. Ann. 1036; *Blackburn v. Craufurd*, 22 Md. 447; *Keeffe et al. v. Third Nat. Bank of Syracuse*, 177 N. Y. 305, 69 N. E. 593.

Finding no reversible error in the record, the judgment of the court below is affirmed.

All the Justices concur.

 LIDECKER TOOL CO. v. COGHILL, *Constable*.

No. 2848. Opinion Filed December 3, 1912.

(128 Pac. 680.)

APPEAL AND ERROR—Case-Made—Extension of Time—Special Judge—Judge Pro Tem. A special judge, or a judge *pro tempore*, has no power, after he ceases to sit as a judge, to extend the time for making and serving a case-made; and, where he attempts to do so, his act is a nullity.

(Syllabus by the Court.)

Error from Rogers County Court;
John Q. Adams, Judge pro tem.

Action by the Lidecker Tool Company against J. W. Coghill, Constable. Judgment for defendant, and plaintiff brings error. Dismissed.

J. W. Swarts, for plaintiff in error.

Ezzard & Holtzendorff, for defendant in error.

WILLIAMS, J. On January 11, 1911, the motion for a new trial was overruled by John Q. Adams, the judge *pro tempore*, who tried the cause in the lower court. At that time the plaintiff

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in error (plaintiff below) was granted an extension of 60 days in which to prepare and serve a case-made. On March 3, 1911, the said John Q. Adams, as judge *pro tempore*, again extended the time for 60 days in which to prepare and serve a case-made. The case-made was served on May 8, 1911, and settled by the said John Q. Adams, the special judge, on May 22, 1911.

It is settled that a special judge, or judge *pro tempore*, after he has ceased to sit as a judge, has no power to extend the time to serve a case-made, and "where he attempts to do so his act is a nullity." *Murphey v. Favors*, 31 Okla. 162, 120 Pac. 641; *Casner v. Wooley*, 28 Okla. 424, 114 Pac. 700; *Horner v. Goltry & Sons*, 23 Okla. 905, 101 Pac. 1111; *City of Shawnee v. Farrell*, 22 Okla. 652, 98 Pac. 942.

The proceeding in error is therefore dismissed.

All the Justices concur.

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No. 2885. Opinion Filed December 3, 1912.

(128 Pac. 501.)

APPEAL AND ERROR—Record—Equity Cases. Under the practice in force in the Indian Territory prior to the erection of the state in equity cases, all papers properly filed in the case became on appeal a part of the record to be included in the transcript. Neither was any motion for a new trial necessary nor a bill of exceptions, except where oral testimony had been used and not taken down and filed as depositions.

(Syllabus by the Court.)

Error from Superior Court, Muskogee County;
Farrar L. McCain, Judge.

Action by Dick Harrison and others against George A. Murphy. Judgment for defendant, and plaintiffs bring error. Motion to dismiss overruled.

Chas. F. Runyan, for plaintiffs in error.

W. W. Noffsinger and Y. P. Broome, for defendant in error.

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WILLIAMS, J. On February 23, 1907, the plaintiffs in error, as plaintiffs, commenced an action in equity for "declaration of trust, for an accounting, and for cancellation of deeds" against the defendant in error, as defendant. At the erection of the state, by section 3 of the Act of Congress of March 4, 1907 (section 438, Williams' Ann. Const. Okla.; 34 St. at L. 1286), and section 27 of the Schedule to the Constitution (section 291, Williams' Ann. Const. Okla.), said cause was transferred to the district court of Muskogee county. On March 17, 1910, by virtue of section 11 of the Act of March 6, 1909 (Sess. Laws 1909, p. 181; section 1974, Comp. Laws 1909; *Oklahoma Fire Ins. Co. v. Phillip*, 27 Okla. 234, 111 Pac. 334), said cause was transferred to the superior court of Muskogee county. On January 9, 1911, said cause, by consent, was referred to Hon. Chas. A. Cooke, as referee, "to hear the testimony introduced by both parties, and that he report his findings of fact upon the same, and that he report his conclusions of law deduced therefrom, and that the report showing his findings of fact and his conclusions of law therefor be filed with this court on or before the 15th day of February, 1911." On said date the referee filed his report. The record contains the following statement:

"Copy of the evidence taken before him (referee) together with his report thereon embodying his findings of fact and conclusions of law therefrom and the exceptions and motion for a new trial filed by the plaintiffs therein, which said report, with the exceptions of the plaintiffs thereto, and a motion for a new trial filed by the said plaintiffs, is in words and figures as follows: * * *

Counsel for defendant in error move to dismiss this proceeding in error on the ground that a motion for a new trial was not filed with the trial court. *First National Bank v. Oklahoma National Bank*, 29 Okla. 411, 118 Pac. 574. This being a pending action at the time of the erection of the state, the existing procedure as to the trial court was preserved. *St. Louis & S. F. R. Co. v. Cundieff*, 171 Fed. 319, 96 C. C. A. 211; *Loeb v. Loeb*, 24 Okla. 384, 103 Pac. 570; *Swift v. Coulter*, 28 Okla. 768, 115 Pac. 871; *Runyan v. Fisher*, 28 Okla. 450, 114 Pac. 717; *Missouri, K. & T. Ry. Co. v. Walker*, 27 Okla. 849, 113

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Pac. 907; *Wheatland Grain & Lumber Co. et al. v. Dowden*, 26 Okla. 441, 110 Pac. 898; *Missouri, O. & G. Ry. Co. v. Gentry*, 31 Okla. 579, 122 Pac. 537; *Hawkins v. United States*, 3 Okla. Cr. 651, 108 Pac. 561; *Harris v. United States*, 4 Okla. Cr. 317, 111 Pac. 982, 31 L. R. A. (N. S.) 820, Ann. Cas. 1912B, 810; section 365, Williams Ann. Const. Okla., and authorities cited in note.

In *Gwinnup et al. v. Griffins et al.*, 26 Okla. 868, 113 Pac. 510, it is said:

"Under the Indian Territory procedure, there being no such a thing as a case-made, it is insisted that nothing, unless it was a part of the record proper, could be brought into the record of an action at law except by a bill of exceptions. Under the Oklahoma procedure, a case-made does not become a part of the record of the trial court. *St. Louis & San Francisco R. Co. v. Messenger, Clerk of District Court, et al.* (No. 1,591) [26 Okla. 590, 110 Pac. 893]. It becomes, however, a part of the record of the proceeding in error in the appellate court, being prepared preliminary to the instituting of a proceeding in error in such tribunal."

As to the record of this case in the lower court, the practice existing at the time of the erection of the state applied. Where the cause of action arose prior to but was commenced subsequent to the erection of the state, the rule is different. *Independent Cotton Oil Co. v. Beacham*, 31 Okla. 384, 120 Pac. 969; *Chicago, R. I. & P. Ry. Co. v. Bankers' National Bank*, 32 Okla. 290, 122 Pac. 499; *Chicago, R. I. & P. v. Baroni*, 32 Okla. 540, 122 Pac. 926.

This being an equity case, it is not essential to determine whether the Arkansas or the federal practice applied, as in either jurisdiction a motion for a new trial was not required to be filed in order to have the judgment reviewed. *Le May v. Johnson*, 35 Ark. 225; *Berry v. Singer*, 10 Ark. 483; *Knight v. Illinois Cent. R. Co.*, 180 Fed. 368, 103 C. C. A. 514; *Duke v. St. Louis & S. F. R. Co.* (C. C.) 172 Fed. 684; *Howell et al. v. Brown*, 5 Ind. T. 718, 83 S. W. 170; *Sparks v. Childers*, 2 Ind. T. 187, 47 S. W. 316.

All the witnesses in this case were examined before the referee or master in chancery, and their testimony reduced to writing and reported by him to the court and read at the hearing.

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Both under the federal and Arkansas rule such evidence became a part of the record. *Blackburn v. Morrison et al.*, 29 Okla. 510, 118 Pac. 402, and authorities therein cited.

The motion to dismiss must be overruled.

All the Justices concur.

ST. LOUIS & S. F. R. CO. v. THOMPSON, *County Treasurer, et al.*

No. 2885. Opinion Filed December 3, 1912.

(128 Pac. 685.)

1. **TAXATION—Limitation of Amount—Statutory Provision.** By reason of act of the Legislature, entitled "An act to provide for the levying of taxes on an *ad valorem* basis," etc. (chapter 64, Sess. Laws 1910, p. 109), the county excise board is without power to levy during any one year for township purposes in any township a tax in excess of the amount estimated by the directors of said township as necessary to defray the current expenses of said township during the ensuing fiscal year as approved by the county excise board and an additional amount of ten per cent. thereon for delinquent taxes. Any tax levied by the excise board in excess of such an approved estimate of the township officers and an additional ten per cent. for delinquent taxes is, as to such excess levied, illegal and void.
2. **SAME.** The foregoing act operates prospectively only, and did not have the effect to render void taxes levied prior to the time said act became effective by school districts under the procedure then prescribed by the statute for levying taxes for school district purposes.

(Syllabus by the Court.)

Error from District Court, Cherokee County;
John H. Pitchford, Judge.

Action by the St. Louis & San Francisco Railroad Company against J. P. Thompson, county treasurer of Cherokee county, and others. Judgment for defendants, and plaintiff brings error. Affirmed and remanded with instructions.

W. F. Evans and *R. A. Kleinschmidt*, for plaintiff in error.

Huston B. Teehee and *J. I. Coursey*, for defendants in error.

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HAYES, J. In this case plaintiff in error, St. Louis & San Francisco Railroad Company, seeks to enjoin the defendants, who are county treasurer and sheriff of Cherokee county, from collecting from plaintiff the sum of \$684.65 as a portion of the taxes levied upon plaintiff's property by various townships and school districts in Cherokee county for the fiscal year ending June 30, 1911. Plaintiff contends that the taxes levied are illegal and void, because the same were levied in excess of the estimates made by the authorities of said townships and school districts authorized by law to make estimates of the amount of taxes necessary to defray the expenses of such municipalities for the next fiscal year. The district court in which the action was originally filed granted a temporary injunction, which, on the final trial, was dissolved and judgment rendered against plaintiff.

There is no controversy about the material facts. The assessed valuation of all property subject to an *ad valorem* tax in Park Hill township in said county for the year involved was \$691,870. The necessary charges and expenses of said township for said fiscal year, including current expenses, and an allowance for sinking fund and interest, and an additional ten per cent. for delinquent taxes, as shown by the estimate certified by the proper officers of the township to the county excise board is \$1,556; but the excise board of the county levied a tax of two and one-half mills, which produces a total tax in the sum of \$1,729, or an excess of \$185 over the estimate certified to the excise board of the county. Plaintiff owns property in said township of a total valuation of \$252,584. The levy as made by the county excise board creates a tax of \$631.46 upon plaintiff's property; whereas, if a levy had been made sufficient in amount only to meet the estimate certified to the excise board, the rate of tax on plaintiff's property would have been twenty-five hundredths mills less, and plaintiff's tax in said township would have been \$568.31, or a difference of \$63.15, which amount plaintiff contends was an excessive levy and made without authority of law. In school district No. 7 in said county the total valuation of the property was \$96,679. The levy made by the excise board was three and one-half mills, which produced a sum of \$338. The necessary charges

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and expenses of said school district for the fiscal year, including the current expenses, allowance for sinking fund, and interest and an additional ten per cent. for delinquent taxes, as shown by the estimate made by the proper officers of the school district and certified to the excise board, is \$290, to raise which amount a levy of three mills upon the total valuation of the property in the district would be sufficient; and it is contended, therefore, that the tax levied was excessive to the extent of one-half of a mill on the dollar. The assessed valuation of plaintiff's property in this district is \$62,060, and it therefore contends that an excessive levy upon its property in this district was levied in the sum of \$31.03. The facts as to the other districts involved are so similar to those of the foregoing mentioned districts that it is unnecessary for them to be set out here in detail. The same principle of law will apply to all of them.

The various levies complained of were made by the excise board of the county under the provisions of an act of the Legislature approved March 17, 1910, which became effective 90 days after its approval (Sess. Laws 1910, p. 109). Section 2 of this act provides that the trustees or directors of each township and the directors of each school district in a county shall make out an itemized statement of the fiscal condition of their respective municipalities and of the estimated need thereof for the current expenses of each for the ensuing fiscal year, including balance on hand, estimated income from the apportionment from the school fund, based on the distribution of the next preceding fiscal year; also an estimate of the amount necessary for current expenses for the ensuing year, including the amount necessary for a sinking fund sufficient to pay at maturity all bonded indebtedness and all interest on outstanding bonded indebtedness, and that such officers of the township or municipality or school district shall publish such estimate in some newspaper published in the township or school district for four consecutive issues, if in a daily paper, and for two consecutive issues, if in a weekly paper; and, if there be no newspaper published in said district, then a copy of such estimate shall be posted in at least five public places within the district or township, and said estimate shall be certified to the ex-

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cise board of the county, together with affidavits showing the publication thereof as required by the act.

Section 3 of the act creates an excise board, composed of certain county officers named therein, whose duties it is declared shall be as prescribed by the act.

Section 4 of the act provides that the excise board shall meet at the county seat on the last Saturday in July in each year for the purpose of examining all estimates made to it, and gives to the board power to revise and correct any estimate certified to it, where the amount thereof is in excess of the just and reasonable needs of the municipality for which the estimate was made. When they have approved the estimates, it is made their duty to ascertain the assessed valuation of the property taxed on an *ad valorem* basis in the district or township, and to ascertain the probable income of such municipality from all sources other than *ad valorem* taxation. They are required to add ten per cent. to the estimate as approved for delinquent taxes, and then to levy a tax sufficient in amount to meet such estimate with the ten per cent. added for delinquent taxes. The excise board is given no authority to make the estimate of expenses of the townships or the school districts; nor is it authorized to increase such estimates as made by the municipal authorities. They may investigate them, and, if they ascertain that the estimates are greater than will be necessary for the purposes the statute enumerates, the excise board, before approving them, may reduce the estimates. Its authority to levy taxes to raise funds to meet the estimated expenses each year is granted solely by the statute, and the measure of its power relative thereto must be found in the terms of the statute. The statute contemplates that each year shall take care of itself; that no greater amount of taxes shall be levied during any one year than shall be necessary to take care of the obligations of the municipality, incurred or maturing during that year, which amount shall be fixed by an approved estimate before the tax is levied.

Wiggins et al. v. A., T. & S. F. Ry. Co., 9 Okla. 118, 59 Pac. 248, and *A., T. & S. F. Ry. Co. v. Wiggins*, 5 Okla. 477, 49 Pac. 1019, are in point, and sustain the contention of plaintiff

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that the levy of the tax in excess of the estimate is illegal and void. The statute involved in the foregoing cases authorized the board of county commissioners to levy a tax each year for the purpose of paying the salaries of the county officers, and an additional amount of 25 per cent. thereof to cover delinquent taxes. In each of said cases it was held that the board of county commissioners was without authority to levy in excess of the amount of the salaries for the current year, and the 25 per cent. for delinquent taxes. It is urged by defendants that these cases held the tax involved illegal because the levy was greatly excessive, and that such levies would not have been illegal if the excess had been small. It is true that in the syllabus to the first-mentioned case the court uses the following language:

"And, where a board of county commissioners makes a levy for an amount greatly in excess of this sum, such excess is illegal and upon proper application the collection thereof will be enjoined."

But the court by such language was applying only the law to the facts in that case, for in that case the excess was great; but there is no intimation in the opinion that the levy would not have been held invalid, if the excess had been much smaller. On the contrary, the law is correctly stated in the opinion in the following language:

"The statute only authorizes the commissioners to make a levy sufficient to pay the salaries for that particular year. They are to make an estimate of the amount of money which will be required to pay the salaries for the year, and to this amount they are required to add 25 per cent. as allowance for delinquent taxes. The amount of money which will be required to pay county salaries for a given year, under our present law, can be definitely ascertained. The amount of taxes authorized to be levied is the total amount of the county salaries for that particular year, plus 25 per cent. additional for delinquencies, and the county commissioners have no right, under the law, to levy an assessment for an amount in excess thereof."

The statute involved in the foregoing cases does not fix more definitely the amount of taxes the board is authorized to levy for any year than does the statute in the instant case. In those cases the amount authorized to be levied was the amount of the

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salaries of the county officers for the year, plus 25 per cent. additional for delinquent taxes. In this case it is the amount of the approved estimate of expenses, plus ten per cent. for delinquent taxes. The levy of taxes in excess of this amount is not a mere irregularity effecting no injustice, but results in subjecting the property of the taxpayers to the payment of a tax that is void because unauthorized. Plaintiff has offered to pay the legal part of the taxes, and to pay such amount as may be adjudged by the court to be due. It is therefore entitled to the remedy of injunction to prevent the collection of the illegal excessive part of the levy. *Wiggins et al. v. A., T. & S. F. Ry. Co., supra*; *A., T. & S. F. Ry. Co. v. Wiggins, supra*; *Collins et al. v. Green et al.*, 10 Okla. 244, 62 Pac. 813; *Russell v. Green et al.*, 10 Okla. 340, 62 Pac. 817.

Section 9, art. 10, of the Constitution, provides that the amount of taxes on an *ad valorem* basis that shall be levied during any one year for school district purposes shall not be more than five mills on the dollar, provided that said annual rate may be increased by any school district by an amount not to exceed ten mills on the dollar valuation, on condition that the majority of the voters of the district voting at an election vote for said increase. Section 1 of the act of the Legislature approved March 17, 1910, *supra*, likewise provides that the amount of taxes levied during any year for school district purposes shall not exceed more than five mills; but, by section 5 of the act, it is provided that if the estimate certified to the excise board for the current expenses of the school district for any year shall be in excess of the amount of taxes that may be derived from a five-mill levy upon the property of such district, and the excise board finds that such excess is reasonably necessary, the board shall enter such facts upon the record of its proceedings, and shall give notice by publication that a special election will be held in the district on the second Tuesday after the first Monday in August next thereafter for the purpose of submitting to the qualified electors of the district the question of making an increased levy, and such election is required to be held under the general election laws of the state. For school districts Nos. 34, 48, and 51 in Cherokee county for the fiscal

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year ending July 1, 1911, levies have been extended upon the tax books in excess of five mills. In district No. 34, the total levy is seven and one-half mills. In districts 48 and 51 it is ten mills. The county excise board at no time entered upon its records its approval of the necessity of a levy in excess of five mills authorized by section 1 of the foregoing taxing act, and did not call any election for the purpose of voting a tax in excess thereof, and no such election was held as is provided by section 5 of the act. It is contended by plaintiff in error that the school tax levied in said districts in excess of five mills is for the foregoing reasons void. It appears from the record that on the 7th day of June, 1910, in each of these school districts the taxes levied therein were voted at the annual school meeting in said district. The act approved March 17, 1910, did not become effective until 90 days after its approval, which was June 15, 1910. Section 9, art. 10, of the Constitution, does not provide by whom, when, or by what procedure any taxes levied thereunder for school district purposes that do not exceed five mills on the dollar for any year shall be levied, and leaves the same to be provided for by legislative enactment. Nor does said section in itself prescribe a procedure for holding elections by which to vote a levy in excess of five mills. But said provision of the Constitution, supplemented by sections 8045 and 8056, Comp. Laws 1909, is self-executing, and a full and complete procedure is provided for levying such taxes. *Tilley v. Overton*, 29 Okla. 292, 116 Pac. 945. And the same could be levied at the annual meeting in the school district held on the first Tuesday in June of each year.

When on the 7th day of June, 1910, the voters in school districts Nos. 34, 48, and 51 at their annual meeting levied the taxes involved for their respective districts, the act of 1910 had not become effective, and the foregoing statutes were in force, and the districts were authorized at said meeting to levy the tax for the ensuing year. When the act of 1910 became effective on the 15th day of the same month, the tax for said district for the ensuing year had been levied in the manner prescribed by law at the time the levy was made. There is no expressed intention in the act of the Legislature that said act should be given a retrospective oper-

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ation. Statutes, as a rule, are to be construed as having a prospective operation only, unless the purpose and intention of the Legislature to give them a retrospective effect is expressly declared in the act, or is necessarily implied from its provisions. *Adair v. McFarlin et al.*, 28 Okla. 633, 115 Pac. 787; *Good et al. v. Keel et al.*, 29 Okla. 325, 116 Pac. 777.

We are therefore of the opinion that the levy made by said districts is valid, and injunctive relief as to such levies was properly denied to plaintiff by the trial court; and to that extent the judgment of the trial court should be affirmed. It is accordingly ordered that the cause be remanded, with instructions to set aside the judgment heretofore rendered, and to enter a judgment enjoining the excessive levies in the different townships and districts made by the excise board of the county in excess of the estimate for expenses approved and an additional ten per cent. for delinquent taxes, and denying to plaintiff any relief as to the levies made in school districts Nos. 34, 48 and 51, and that the costs of this proceeding be equally divided between the parties hereto.

TURNER, C. J., and WILLIAMS and KANE, JJ., concur;
DUNN, J., absent, and not participating.

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No. 2996. Opinion Filed December 3, 1912.

(128 Pac. 713.)

CHAMPERTY AND MAINTENANCE—Deed by Party Out of Possession. By reason of section 2215, Comp. Laws 1909, a deed conveying real estate, executed by a grantor at a time when he was not in possession of the conveyed premises, is void as between the grantee and a person who was at the time of the conveyance in adverse possession of the conveyed premises; and this rule applies where the grantor is an allottee of the Chickasaw and Choctaw Tribes of Indians upon whose power to alienate his allotment the restrictions have been removed prior to the time of the execution of the deed, and where the person in possession originally obtained possession and claims title to the conveyed premises by virtue of a void deed executed by the allottee before the removal of restrictions upon his power to alienate his allotted lands.

(Syllabus by the Court.)

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*Error from District Court, Atoka County;
Robert M. Rainey, Judge.*

Action by C. W. Miller against A. J. Fryer. Judgment for defendant, and plaintiff brings error. Affirmed.

J. M. Humphreys, for plaintiff in error.

Winfield S. Farmer, for defendant in error.

HAYES, J. This is a suit in ejectment brought originally by plaintiff in error, C. W. Miller, against defendant in error, A. J. Fryer, for the possession of certain lands fully described in plaintiff's petition. After trial to the court without a jury, the court rendered judgment in favor of plaintiff for the possession of twenty acres of the land involved and against plaintiff, and in favor of defendant for the remaining 80 acres. From the judgment against plaintiff as to the 80 acres plaintiff prosecutes this appeal. Defendant, as to the judgment against him for the twenty acres, has made no complaint, either by appeal or cross-appeal.

The facts, briefly stated, are: That one William Butler and his wife, Adeline Butler, are Choctaw freedmen duly enrolled as such on the approved rolls of freedmen of the Choctaw Tribe of Indians. On the 21st and the 22d days of December, 1904, said Butler and his wife were allotted each 40 acres of land as their share of the tribal lands of the Choctaw Indians to which they were entitled as freedmen of said tribe. On the 22d day of December, 1904, Butler and his wife conveyed by warranty deed the lands allotted to them and now in controversy, to defendant, who caused the deed to be recorded. On the 27th day of July, 1908, Butler and his wife executed two separate deeds by which they conveyed to plaintiff the same lands, and his deeds were duly recorded. At the time of the execution of the deeds to defendant, he was then in possession of the lands conveyed, and has been continuously in possession thereof at all times since that date, and has been occupying and cultivating and using the same, and had been in exclusive possession thereof for more than one year prior to the time of the execution of the deeds, and had during such time collected the rents and profits therefrom. In fact, neither the

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Butlers nor plaintiff has ever been in actual possession of said lands at any time.

It is the contention of plaintiff that the deed executed to defendant is void, because the same is in violation of section 29 of the act of Congress, commonly known as the Curtis Act, approved June 28, 1898 (30 St. at L. p. 495, c. 517). It is his contention that the statute referred to makes the entire allotment of freedmen of the Chickasaw and Choctaw Nations a homestead and inalienable for a period of 21 years from the date of patent; that defendant's deed therefore is void and conveyed to him no title; that his (plaintiff's) deed was taken more than 60 days after the 27th day of May, 1908, upon which date there was enacted by Congress an act removing restrictions upon the power of said freedmen to alienate their allotted lands. Act May 27, 1908, c. 199, 35 St. at L. p. 312. Defendant, on the other hand, contends that said section 29 of the Curtis Act does not make the allotment of freedmen of the Choctaw and Chickasaw Nations a homestead, and that the act of Congress approved April 21, 1904 (33 St. at L. 189, c. 1402), removes all restrictions on the allotted lands of freedmen, and that the deed to defendant conveyed all the title of the allottees in said land, and that at the time of the execution of the deeds to plaintiff they had no title to convey to plaintiff. It is unnecessary, however, to determine these contentions of the respective parties; for, if we assume without deciding that section 29 of the Curtis Act makes the entire allotment of a Chickasaw or Choctaw freedman a homestead, and imposes restrictions upon its alienation for a period of 21 years, and defendant's deed, therefore, was void, because executed in violation of said restrictions upon the allottee's power to alienate, still the judgment of the trial court must be affirmed upon another ground.

On the 27th day of July, 1908, the date of the conveyance to plaintiff, there was in force in this state section 2215, Comp. Laws 1909, which provides:

"Every person who buys or sells, or in any manner procures, or makes or takes any promise or covenant to convey any pretended right or title to any lands or tenements, unless the grantor thereof, or the person making such promise or covenant has been in possession, or he and those by whom he claims have been in

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possession of the same, or of the reversion and remainder thereof, or have taken the rents and profits thereof for the space of one year before such grant, conveyance, sale, promise or covenant made, is guilty of a misdemeanor."

This section of the statute has received the consideration of this court, and been applied in several cases, all of which are referred to and reviewed in the recent case of *Martin v. Cox et al.*, 31 Okla. 543, 122 Pac. 511. In this case the court held that the foregoing statute, making it a misdemeanor to buy or sell any pretended right or title to land, where the grantor or those by whom he claims have not been in possession or taken the rents and profits thereof for the space of one year before such conveyance, is declaratory of the common law, and that a conveyance made in contravention thereof by the rightful owner as against the person holding adversely is void, and that it is not necessary in order that such shall be the result of the statute that the person holding shall hold under color of title at the time of the conveyance. It is sufficient if he was in possession adversely to plaintiff and his grantors.

Counsel for plaintiff in error contends that the foregoing statute does not operate to render the deed of plaintiff void, for the reason that, although defendant had been in possession of the land for more than one year prior to the conveyance thereof to plaintiff, defendant had not been in adverse possession for such period of time. He contends that there can be no adverse possession of the lands of an allottee upon the alienation of which there are restrictions imposed by the federal government; that no possession, however long and hostile it may be to the allottee, can, under the statutes of limitation, ripen into title. It is well settled that there can be no adverse possession against the federal government which can form the basis of title by estoppel or under the statutes of limitation; and it has been held that the same rule applies where the lands involved are lands that have been allotted to Indians with restrictions upon the alienation of title thereto by the Indians, so long as such restrictions upon alienation exist. *McGannon v. Straightlege*, 32 Kan. 524, 4 Pac. 1042; *O'Brien v. Bugbee*, 46 Kan. 1, 26 Pac. 428. But, where the restrictions upon the alienation of title by the Indian allottee have

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been removed, such allottee then stands upon an equal footing with other citizens of the state, and a title against him may be established upon an adverse possession maintained subsequent to the removal of restrictions for the period prescribed by the statute. *Davis v. Threlkeld*, 58 Kan. 763, 51 Pac. 226; *Forbes v. Higginbotham*, 44 Kan. 94, 24 Pac. 348.

But the contention of counsel is based upon a misconstruction of the provisions of the statute, which, except as to the penalty imposed, is declaratory of the common law. It was the fundamental doctrine of the English law of feuds that feoffment was void without livery of seisin, and without possession a man could not make livery of seisin. Out of this doctrine came the simple principle of the common law that a transfer of real property could not be valid unless the grantor had the capacity as well as the intention to deliver possession, which was an essential part of the title and the dominion over the property. 2 Black. Comm. 311; 4 Kent, 447. It was enacted by St. 32 Henry VIII, c. 9:

"That no person shall bargain or sell, or by any means obtain any pretended rights or titles, or take, promise, grant, or covenant to have any right or title to any hereditaments, unless the seller, his ancestors, or they from whom he claim, have been in possession of the same, or the reversion or remainder thereof, or taken the rents or profits thereof, for one whole year next before the bargain and sale, on pain that such seller shall forfeit the whole value of the hereditaments sold; and the buyer or taker, knowing the same, shall forfeit the value of the hereditaments so by him bought or taken, one-half of the said forfeiture to be to the king, and the other to him who will sue for the same."

Discussing this statute, Montague, C. J., said:

"In this point the statute has not altered the common law; for the common law before the statute was that he who was out of possession ought not to bargain, grant, or let his title; and, if he had done so, it should have been void, and then the statute was made in affirmance of the common law, and not in alteration of it; and all that the statute has done is it has added a greater penalty to that which was void by the common law before." (*Patridge v. Strange*, 1 Plow. 880.)

The common-law rule did not require, nor does the statute here involved require, as an element of its violation that the per-

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son in possession at the time of the conveyance shall have been in adverse possession for a period of one year. On the other hand, the statute is violated, not only if the grantor is out of possession, and there is some one in adverse possession at the time of the conveyance, but if the grantor is in possession, but has not been in actual or constructive possession in person or by those by whom he claims for the period of one year, or has taken the rents and profits thereof for said period of time. Whatever may be the character of defendant's possession before the removal of the restrictions upon the alienation by the allottees at the time this conveyance was made, plaintiff was not in possession. Defendant then was in adverse possession under the admitted facts in this record; and by reason of that fact the deeds executed by the allottees to plaintiff constituted the violation of the statute, and are, as between plaintiff and defendant in possession, void.

This statute, in our opinion, in no way conflicts with the federal act of May 27, 1908 (35 St. at L. p. 312, c. 199), which provides:

"All lands, including homesteads, of allottees of the Five Civilized Tribes, enrolled as intermarried whites, as freedmen and as mixed-blood Indians having less than half Indian blood, shall be free from all restrictions."

What was intended by this statute was to remove restrictions upon the alienation of their allotments by the classes of allottees named in the statute that have been imposed by the statutes and treaty provisions under which the allotments have been made and to leave such allottees free to convey their lands, subject to the laws of the state regulating conveyances of real estate. The statute of the state here involved does not render valid any deed made in violation of the prohibitions of the treaties against alienation, or operate to vest defendant with any title; but it says to the Indian allottee, as it says to the white citizen of the state:

"You cannot convey a pretended title while out of possession. You must obtain possession by means of the remedy the law affords before a conveyance can be made that will be valid against the person in possession claiming title adversely."

It may not be pertinent to refer to the policy of this law in support of the conclusion we here reach, but we cannot re-

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frain from saying that in our opinion it will not operate to the detriment of allottees upon which the federal government now imposes or has heretofore imposed restrictions upon their power to alienate their allotments. It is well known that the peaceable law-abiding small investor is loath to purchase titles upon which there is any cloud or about which there is any dispute, and, although conveyances made in violation of the statute prohibiting alienation are declared by the courts to be absolutely void, such conveyances have the effect to render the allottee's title in the land of less merchantable value; and only the speculator who can buy such land in large quantities and can afford the expense of litigation to clear up such titles will purchase the same, and as a result thereof the unwary Indian allottee who has conveyed in violation of the statute, when he is permitted to sell, finds his market greatly restricted by the clouded condition of his title and the adverse claims made under the void instruments he has executed. Under the operation of the statute here involved, he can convey his land only after he has cleared his title, and removed the adverse claimant from possession thereof, in which condition it will bring its full market value.

From the foregoing views, it follows that the judgment of the trial court should be, and is, affirmed.

All the Justices concur.

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No. 3062. Opinion Filed December 3, 1912.

(128 Pac. 683.)

APPEAL AND ERROR—Dismissal—Service of Summons. A petition in error will be dismissed on motion, even though the same is filed in this court within the time allowed under the statute, where no waiver of issuance and service of summons in error is had, and no praecipe for same is filed, and no summons issued or general appearance made within such time.

(Syllabus by the Court.)

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Error from District Court, Woods County;

R. H. Loofbourrow, Judge.

Action between R. N. McConnell and the Security State Bank and others. From the judgment, McConnell brings error. Dismissed.

Chas. H. Garnett and Ernest Chambers, for plaintiff in error.

Appleget & Herod, for defendants in error.

HAYES, J. Judgment was rendered in this cause on the 8th day of July, 1910. On the 4th day of January, 1911, plaintiff in error filed his motion to vacate the judgment and decree, which motion was on the 4th day of January, 1911, overruled. Petition in error and case-made were filed in this court on September 20, 1911. No waiver of issuance and service of summons in error and no præcipe for same has been filed, and no summons issued or general appearance made up to this date. Defendants in error have moved to dismiss the appeal, for the reason that no summons in error has been issued, served, or waived, and that no præcipe therefor has been filed within the time required by law.

The motion is well taken; and upon the authority of *City of Lawton v. Connor*, 25 Okla. 398, 106 Pac. 647, *Chicago, R. I. & P. Ry. Co. v. Bradham*, 24 Okla. 250, 103 Pac. 591, and *McMurtry v. Byrd et al.*, 23 Okla. 597, 101 Pac. 1117, the appeal is dismissed.

All the Justices concur.

Title Guaranty & Surety Co. v. Slinker.

TITLE GUARANTY & SURETY CO. v. SLINKER.

No. 3093. Opinion Filed December 3, 1912.

(128 Pac. 698.)

AFFIRMANCE ON AUTHORITY OF PRIOR OPINION. Affirmed on the authority of the *Title Guaranty & Surety Co. v. Wm. Raymond Slinker, a Minor, by His Legal Guardian, A. Neely*, ante, 128 Pac. 696.

(Syllabus by the Court.)

*Error from the District Court, Bryan County;
Summers Hardy, Judge.*

Action by Helen Slinker, a minor, by her legal guardian, A. Neely, against the Title Guaranty & Surety Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Kyle & Newman, and *Edward C. Griesel*, for plaintiff in error.

Chas. E. McPherrren, *Chas. P. Abbott*, and *Chas. B. Cochran*, for defendant in error.

KANE, J. This is an action upon a guardian's bond, commenced by Helen Slinker, a minor, by her legal guardian, A. Neely, against the former guardian and the Title Guaranty & Surety Company, surety upon his bond. The questions involved are identical with those decided by this court in the case of the *Title Guaranty & Surety Co. v. Wm. Raymond Slinker, a Minor, by his Legal Guardian, A. Neely*, ante, 128 Pac. 696.

Upon the authority of that case, the judgment in this case is affirmed.

All the Justices concur.

In re ASSESSMENT OF OSAGE & OKLAHOMA GAS CO.

No. 3106. Opinion Filed December 3, 1912.

(128 Pac. 692.)

1. **TAXATION—Assessment—Appeal to Supreme Court—Trial De Novo.** On appeal from the action of the State Board of Equalization in assessing the property of a public service corporation, the issues are confined to those presented to the Board of Equalization; but the trial here is *de novo*, and evidence may be introduced by both parties; and in doing so they are not confined to the evidence introduced before the Board of Equalization.
2. **SAME—Property of Corporation—Assessment—Equalization.** Evidence examined and found sufficient to sustain the report of the referee.

(Syllabus by the Court.)

Appeal from State Board of Equalization.

In the matter of the assessment of the property of the Osage & Oklahoma Gas Company for taxation by the State Board of Equalization. From an order making such assessment, the Gas Company appeals. From report of referee assessing cash value of the Company's property, the state moves to dismiss. Report confirmed.

Flynn, Chambers, Lowe & Richardson, for Osage & Oklahoma Gas Co.

Chas. West, Atty. Gen., and *W. C. Reeves*, Asst. Atty. Gen., for the State.

HAYES, J. This is an appeal by the Osage & Oklahoma Gas Company, a corporation, hereinafter referred to as the company, from an action of the State Board of Equalization taken on the 2d day of August, 1911, assessing the property of the company for taxation for the year 1911 at \$973,472. At the trial in this court, which was *de novo*, the cause was referred to a referee, agreed upon and selected by the parties, to hear the evidence and report his findings of fact thereon, which he has done, and the cause is now before us upon the motion of the company to confirm the

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report of the referee and upon the motion of the state to dismiss the appeal and upon its objections and exceptions to the referee's report.

On the 17th day of April, 1911, the company filed with the State Auditor, as it is required by statute to do, its annual return, upon which the State Board of Equalization, on the 16th day of May, 1911, made a tentative assessment of its property for taxation for said year in the sum of \$973,472. To this assessment the company made objections and was granted a hearing before the State Board of Equalization on the 28th day of June, 1911; after which hearing, the board overruled all of its objections and adhered to its former assessment. From this order of the board this proceeding is prosecuted.

The sole and only question involved in the appeal, from the standpoint of the company, is the value of the property belonging to the company subject to taxation in this state for the year 1911. In making up its annual return to the State Auditor, the company listed therein only its physical properties for taxation and did not include its bills receivable, cash on hand, or its intangible property, such as franchises, contracts for the sale of gas, or gas lease contracts. The State Board of Equalization, in arriving at the value of the company's property and assessing it for taxation, took into consideration these items of property owned by the company which had been omitted from its annual report. At the hearing before the State Board of Equalization and at the trial in this court it is admitted by the officers of the company that it has a bills receivable account, cash on hands, and franchises of value. It is insisted by the Attorney General on behalf of the state that under the statute (section 1, c. 87, Sess. Laws, 1910), which provides that no matter shall be reviewed on appeal which was not presented to the board appealed from, the company cannot now complain of the increased valuation at which the State Board of Equalization has assessed its property over the amount returned by the company in its annual return, because some of the items of property considered by the board in making up that assessed valuation consist of property not listed in the

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return, and for that reason the appeal should be dismissed. We do not understand such to be the effect of the statute, which was considered and construed in *Re Western Union Telegraph Co.* 29 Okla. 483, 118 Pac 376. In that case it was held that an appeal lies to this court from the action of the State Board of Equalization in assessing property; that under the foregoing statute the issues on appeal are confined to those presented to the Board of Equalization; but that the trial here is *de novo*, and the evidence may be introduced by both parties, and in doing so they are not confined to the evidence introduced before the state board. The State Board of Equalization did not assess the company's property by separate items, but made its assessment thereof in an aggregate amount, including in such assessment all the items not so returned. At the hearing on the tentative assessment of the board, evidence was heard on the value of the entire property. The objection made to the assessment by the company was as to the aggregate assessment, and the evidence introduced was all for the purpose of showing that the aggregate sum at which the property of the company had been assessed was excessive. Upon such an issue any evidence that tended to show the real value of the property of the company was competent and could be introduced either by the company or by the state at the hearing before the State Board of Equalization, and is likewise competent on appeal before this court. The question of fact the company now seeks to have determined is the same issue that was considered at the hearing before the board, and the cause should not be dismissed.

The referee in his report finds the fair cash value of the company's property to be \$400,000. At the hearing before the referee the evidence introduced consisted of two witnesses, who are the secretary and treasurer and the general manager of the company, respectively, and both of whom testified on behalf of the company. The state introduced no evidence whatever. By the evidence of these witnesses it is established that the company is a corporation, organized under the laws of the state of Delaware in 1905, but that all the property owned by it is located in this state. It has an authorized capital of \$1,500,000, of which

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\$450,000 has been paid in. All of its properties were originally bought by it from two certain persons for the sum of \$450,000 in cash, and \$8,000 credit secured by a first mortgage on the properties of the company. The money required to pay the cash consideration was derived from a sale of stock at \$36 per share, the par value of which was \$100 per share. The original property included oil and gas leases on large tracts of lands in the Osage Nation and the business of oil production of about 2,000 barrels per day, and a gas business consisting of a small plant in Tulsa with about 500 consumers. After doing considerable drilling for oil throughout the territory upon which it had leases, the company, in February, 1906, sold all of its oil leases and the oil production of its wells and equipment, including everything pertaining to its oil business, for a consideration of \$450,000 in cash and the assumption by the purchaser of the \$8,000 indebtedness incurred as a part of the original purchase price by the company. A special dividend out of the proceeds of this sale in the sum of \$30 per share was paid to the stockholders, leaving \$90,000 of the original investment of the company still invested in its properties. After this sale the properties of the company consisted of its gas franchise in the city of Tulsa, a gas plant operated in said city and some of its suburbs, together with a pipe line leading from the gas fields to the city, and gas leases and gas rights in certain tracts of land. Its gas plant has from time to time been enlarged, repaired, and improved; but the total value of the physical property of the company cannot be ascertained by adding to the original cost thereof the sums of money that have been subsequently expended upon the plant, for the reason that much of the original plant has been taken out and rebuilt, such as the old pipe lines in the streets, which were replaced as the city has grown and its streets were paved, and some of the property taken out was an entire loss. The testimony of the secretary and treasurer of the company is that on February 1, 1911, the fair cash value of the company's pipe lines, distributing plant, and their accessories which compose the physical properties of the company was \$139,067.53, and this testimony stands uncontradicted and unimpeached. On the same date the appellant had \$18,997.47 in cash,

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and accounts receivable in the sum of \$22,557.23. The same witness testified that its franchise for distributing gas to the consumers in the city of Tulsa was of the value of \$25,000, and was carried upon the books of the company at that sum. The foregoing items make up an aggregate sum of \$205,622.23. In addition to the foregoing property, however, the company owns some gas lease contracts in undeveloped fields which expire in 1916, and has contracts with certain gas companies to furnish them gas at stipulated prices. There is no evidence in the record as to the valuation of these separate items of property, but the secretary and treasurer stated that he regarded the value of the entire property of the company, including gas leases and all the company's contracts and its franchises, to be \$400,000.

The foregoing, in substance, constitutes all the evidence introduced at the hearing before the referee, except that it is shown that during the year ending June 30, 1910, the company made a net earning of \$65,911.41, which is equivalent to six per cent. upon a valuation of approximately \$1,098,532. Upon this fact, principally, it is stated by the Attorney General the valuation of the State Board should be sustained. The earning capacity of property may be considered in arriving at its fair value, but its value cannot be determined by that circumstance alone. It would be a very unreliable method to select any given year and determine the value of any given piece of property by the dividends earned that year; for some years are more productive of profits than others in almost all lines of business, and, if a fruitful year should be selected, a valuation based upon such estimate would probably far exceed the real value of the property. On the other hand, if a poor year were selected, a sum much less than the real value would result. There is no evidence tending to show what the annual earnings of the company from its plant have been, nor its franchise to furnish gas to the residents of the city of Tulsa, but is engaged in competition with another company operating under a similar franchise, and its present franchise expires in 1928 and limits the company in the right it grants to it to furnish natural probable earnings in the future. It does not own an exclusive gas only. Taking into consideration all these facts and the cir-

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cumstances that the state has not offered any evidence whatever to contradict the evidence offered in behalf of the company, we are of the opinion that the report of the referee as to the total taxable value of appellant's property is amply sustained by the evidence and should not be disturbed.

The order of this court is that the report of the referee be confirmed, and judgment entered accordingly.

TURNER, C. J., and WILLIAMS and KANE, JJ., concur;
DUNN, J., not participating.

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No. 3311. Opinion Filed December 3, 1912.

(128 Pac. 688.)

1. **GUARDIAN AND WARD—Contracts—Confirmation by Court—Necessity.** By sections 3506, 3509, and 3511 of Mansf. Dig. of Ark. 1884 (sections 2402, 2405, and 2407, Ind. Ter. Ann. St. 1899), all leases of minors' lands for a term of years by the guardian (not made by virtue of sections 3498 and 3500, Mansf. Dig., sections 2394 and 2396, Ind. Ter. Ann. St.) are required to be reported by him and confirmed by the court. In the absence of such report and confirmation, no right under the lease passes to the purchaser; but where a guardian made application to the court, setting up the facts showing that the ward's real estate should be leased for investment, and that L. offered to take the lease for a certain period under specified terms, and prayed for an order of court directing him to enter into such lease with the said L. under said terms, and the court granted the order prayed for by the guardian and directed the guardian to execute the lease to L., held, that such order constituted a confirmation of the lease, and, if irregular, such irregularity would not vitiate the lease on collateral attack. Following *Spade v. Morton et al.*, 28 Okla. 384, 114 Pac. 724.
2. **INDIANS—Lands—Lease by Guardian.** Leases of allotments of Indian minors in the Five Civilized Tribes confirmed and approved by the trial court in that jurisdiction since April 26, 1906, are not subject to the approval or disapproval of the Secretary of the Interior; but the orders of the court confirming and approving them are final.
3. **APPEAL AND ERROR—Review—Questions of Fact—Trial by Court.** Where a case is tried by a lower court without a jury, and special findings of fact are made, based partly upon oral testimony, such findings, as a rule, are conclusive upon any disputed and doubtful questions of fact.

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4. **GUARDIAN AND WARD—Lands of Ward—Lease—Statutory Provisions.** Mansf. Dig. sec. 3502 (section 2398, Ind. Ter. Ann. St. 1899), as in force in the Indian Territory, empowered the United States courts in the Indian Territory, sitting as probate courts, to authorize the guardian to lease the lands of a minor according to the best interests of the ward, subject to the approval of the court; and sections 3509, 3510, and 3511 of said digest (sections 2405, 2406, and 2407, Ind. Ter. Ann. St. 1899) authorize the probate court to lease for purposes of reinvestment or putting proceeds on interest. **Held'** that, while at common law all leases by a guardian to extend beyond the term of the guardianship were voidable, a lease of a minor's land pursuant to an order of the probate court was valid, though it extended beyond minority. Following *Beauchamp v. Bertig*, 90 Ark. 351, 119 S. W. 75, 23 L. R. A. (N. S.) 659.

(a) The United States courts in the Indian Territory, sitting as courts of chancery, had authority to approve such leases extending beyond the minority of the ward.

(Syllabus by the Court.)

Error from District Court, Washington County;
R. H. Hudson, Judge.

Action by James C. Cowles, Jr., against Alva C. Lee and another. Judgment for defendants, and plaintiff brings error. Affirmed.

J. P. O'Meara, for plaintiff in error.

A. F. Vandeventer, J. R. Charlton, and John J. Shea, for defendants in error.

WILLIAMS, J. This proceeding in error is to review the judgment of the trial court in an action wherein the plaintiff in error, as plaintiff, sued the defendants in error, as defendants, to cancel a certain oil and gas lease on a certain alienable tract of land, purporting to extend fifteen years, and beyond the minority of the said plaintiff.

The following grounds are set up for cancellation: (1) Lease not confirmed by order of court. (2) Failure to pay royalties. (3) Failure to sink wells. (4) Assignment of the lease without the consent of the Secretary of the Interior. (5) Plaintiff, having become of age, elected not to ratify, but disaffirm, said lease, which extended beyond his minority.

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Judgment was entered against the defendant Lee by default. Afterwards, on leave of the court, by amended petition, the Belvy Oil Company, to whom said lease had been assigned prior to the commencement of said action, was made a party. On application, the development for oil under this lease was stayed during the pendency of the action. Under the issues as framed a trial was had before the court, and judgment rendered in favor of the Belvy Oil Co.

In *Spade v. Morton et al.*, 28 Okla. 384, 114 Pac. 724, the sale was sought to be avoided on collateral attack, on the ground that it was never reported by the guardian or confirmed by the court. In the opinion it is said:

"There was, in this case, no formal report of the sale and confirmation thereof after the original order; but the guardian and the court appear to have acted under the impression that the statute authorizes a private sale; and when the guardian made his application for the original order he did not ask to be permitted to offer generally the land for sale, or to receive offers to purchase, but he submitted to the court a specific proposition from the defendant Morton to buy the land at a stipulated price, and prayed the court to authorize and direct him to sell the land to said Morton at said price. The order of the court finds that defendant Morton has offered to purchase the land at a specified price, which the court finds to be an adequate and sufficient price for the land, and the highest and best bid received by the guardian, and directs the guardian not to sell the land and report his action thereon to the court, but to execute to said Morton a deed of conveyance, conveying him the land for the consideration offered. This order, in our opinion, was intended by the court and all parties thereto to constitute the final consummation of the sale; and a subsequent order by the court, expressing its sanction of the sale, could, for that purpose, add nothing to the force of the language of the original order. The order did not direct the guardian to offer for bids, but to convey the land by the execution of a deed. When the proposition of defendant Morton was presented to the court by the application, and the court accepted and approved the same, the contract was finally consummated. If such method of consummating a sale was irregular, the irregularity could have been reviewed on appeal, but cannot be considered here. * * * In the case at bar the bid was reported and was accepted by the court, and the deed was executed; and, however irregular the making of the order in this form may

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be, the effect thereof in this proceeding cannot be, we think, subject to much doubt."

At the time of the assignment of the lease, to wit, on August 10, 1910, the said James C. Cowles, Jr., was 21 years of age, having reached said period on the 10th day of July, 1910. This lease having been entered into under the laws as they existed prior to the erection of the state, under *Spade v. Morton et al.*, *supra*, it was valid, unless it is rendered invalid on account of the term extending beyond the minority of said minor, or being assigned to the Belvy Oil Company without the approval of the Secretary of the Interior, or some other forfeiture of its terms.

The restrictions against alienation having been removed from said minor's allotment by virtue of the act of April 26, 1906 (34 St. at L. p. 137, c. 1876), after said date leases of allotments of minors in the Five Civilized Tribes, approved by the trial courts in that jurisdiction, are not subject to the approval or disapproval of the Secretary of the Interior; but the orders of the court approving them are final. *Morrison et al. v. Burnette et al.*, 83 C. C. A. 391, 154 Fed. 617; *Jennings v. Wood et al.*, 192 Fed. 657; *Kolachny v. Galbreath et al.*, 26 Okla. 772, 110 Pac. 902, 38 L. R. A. (N. S.) 451; *Eldred et al. v. Okmulgee Loan & Trust Co.*, 22 Okla. 742, 98 Pac. 929.

The United States court for the Northern District of the Indian Territory, at Tahlequah, prior to the erection of the state exercising both probate and chancery powers, had the power to authorize a guardian to lease the lands of his ward for a period extending beyond his minority. *Huston et al. v. Cobleigh*, 29 Okla. 793, 119 Pac. 416, which followed *Beauchamp v. Bertig et al.*, 90 Ark. 351, 119 S. W. 75, 23 L. R. A. (N. S.) 659. See, also, *Ricardi et al. v. Gaboury et al.*, 115 Tenn. 484, 89 S. W. 98; *Marsh et al. v. Reed et al.*, 184 Ill. 263, 56 N. E. 306.

The plaintiff is foreclosed as to all questions of forfeiture of the lease, on allegations of failure of the lessee to comply with its terms, by the finding of the trial court. *Hausam v. Parker*, 31 Okla. 399, 121 Pac. 1063.

It is not essential to pass on the question as to whether the court should have permitted the plaintiff to amend his petition,

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as, under *Spade v. Morton et al.*, *supra*, the order authorizing the specific lease of the land under specified terms amounted to a confirmation.

Counsel for plaintiff in error insists that, although the supervision of the Secretary of the Interior over said land had been withdrawn by the act of April 26, 1906, yet the lease provided:

"It is mutually understood and agreed that this indenture of lease shall in all respects be subject to the rules and regulations heretofore or that may hereafter be lawfully prescribed by the Secretary of the Interior relative to oil and gas leases in the Cherokee Nation, and that this lease, or any interests therein, shall not, by working or drilling contract or otherwise, or the use thereof, directly or indirectly, be sublet, assigned or transferred without the consent of the Secretary of the Interior first obtained, and that should he or his sublessees, heirs, executors, administrators, successors or assigns violate any of the covenants, stipulations, or provisions of this lease, or any of the regulations, or fail for the period of 60 days to pay the stipulated royalties provided for herein, then the Secretary of the Interior, after ten days from notice to the parties hereto, shall have the right to avoid this indenture of lease and cancel the same, when all the rights, franchises and privileges of the lessee, his sublessees, heirs, executors, administrators, successors or assigns hereunder, shall cease and end without resorting to the court and without further proceedings, and the lessors shall be entitled to immediate possession of the leased land and the permanent improvements located thereon."

As the Secretary of the Interior has not elected to declare a forfeiture of the lease, it is not essential to determine whether, under its contractual terms, he could have done so in this particular case.

This lease provides for a ten per cent. royalty, and the guardian is authorized to collect same and all funds arising therefrom.

Error in the judgment of the trial court must be shown by the plaintiff in error. All intendments and presumptions are in favor of said judgment.

The judgment of the lower court is affirmed.

All the Justices concur.

McKain v. J. I. Case Threshing Mach. Co.

MCKAIN v. J. I. CASE THRESHING MACH. CO.

No. 3333. Opinion Filed December 3, 1912.

(128 Pac. 895.)

APPEAL AND ERROR—Affirmance—Failure to Prosecute. Judgment was rendered in the court below against a party for a certain sum, and a proceeding in error instituted in this court, which such party fails to prosecute. Said judgment having been superseded, on motion, the same will be affirmed.

(Syllabus by the Court.)

*Error from Osage County Court;
C. T. Bennett, Judge.*

Action by the J. I. Case Threshing Machine Company against E. L. McKain. Judgment for plaintiff, and defendant brings error. Affirmed.

Grinstead, Mason & Scott, for plaintiff in error.

Leahy & MacDonald and *Shartel, Keaton & Wells*, for defendant in error.

WILLIAMS, J. This cause comes on to be heard upon the motion of the defendant in error to affirm the judgment of the court below.

Upon the authority of *Merchants' & Planters' Ins. Co. v. Crane et al.*, 31 Okla. 713, 123 Pac. 1127, the judgment of the lower court is affirmed.

All the Justices concur.

Bradley et al. v. Chestnutt-Gibbons Grocer Co.

BRADLEY *et al.* v. CHESTNUTT-GIBBONS GROCER CO.

No. 3414. Opinion Filed December 3, 1912.

(128 Pac. 498.)

APPEAL AND ERROR—Review—Objections Not Raised Below. Where an action is tried in the trial court before a judge pro tem., elected by the members of the bar under the provisions of the statute for the election of judges pro tem., and no question is there raised as to the power or authority of such judge pro tem. to hear and determine the case, or as to the regularity of his election, and all the parties proceed to trial without objection or exception thereto, the regularity of his election and his authority to hear and determine the case cannot be questioned for the first time in this court on appeal.

(Syllabus by the Court.)

Error from Superior Court, Muskogee County;
L. J. Roach, Special Judge.

Action by the Chestnutt-Gibbons Grocer Company against Cass M. Bradley and O. Durant. Judgment for plaintiff, and defendants bring error. Affirmed.

Gibson & Thurman, for plaintiffs in error.

Irwin Donovan, for defendant in error.

HAYES, J. Defendant in error brought this action in the court below against plaintiffs in error to recover on a promissory note the sum of \$2,000 and interest at eight per cent. per annum. The regular elected judge of said court announced his disqualification to sit in said cause, and a special judge, after due notice was given to all concerned, was duly elected by the members of the bar, as provided by law, to try said cause. The cause was tried to the court without a jury, who found the issues in favor of defendant in error and rendered judgment accordingly. Plaintiffs in error filed a motion for a new trial, which was overruled by the court, and the case is now before us on petition in error and case-made.

Plaintiffs in error, in their brief, urge but one ground for reversal of the judgment, and that is: "Irregularity in the proceed-

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ings for the election of the special judge." The record before us does not disclose that any objections or exceptions to the election of the special judge were made in the court below. Defendant in error has asked that the judgment of the court below be affirmed, for the reason that plaintiffs in error have raised, for the first time on appeal, the question of irregularity in the election of the special judge; and the record therefore presents nothing to review. The motion to affirm should be sustained. It is a well-settled rule of law that where parties try their case before a special judge, or a judge *pro tem.*, and no objection is made or exceptions saved in the court below as to the authority of the judge to try the case, all objections to the authority of the special judge will be assumed by the appellate court to have been waived; and said objection cannot be heard for the first time on appeal. *Higby v. Ayres*, 14 Kan. 332; *Vandever et al. v. Vandever et al.*, 3 Metc. (60 Ky.) 137; *Feaster v. Woodfill*, 23 Ind. 493; *Greenwood v. State*, 116 Ind. 485, 19 N. E. 333. See, also, 11 Encyc. of Plead. & Prac. p. 793, and authorities there cited.

The judgment of the trial court is affirmed.

All the Justices concur.

ST. LOUIS & S. F. R. CO. v. CORPORATION COMMISSION OF OKLAHOMA et al.

No. 3703. Opinion Filed December 3, 1912.

(128 Pac. 496.)

PROHIBITION—Railroads—Highway Crossings—Installation—Power of Corporation Commission. Where no highway or crossing has been lawfully established or opened over the right of way of a railway company, the Corporation Commission has no jurisdiction to determine the character of crossing to be provided at such a point and require its installation; and where in such a case it makes an order requiring a public crossing to be installed, a writ of prohibition may issue to prevent its enforcement.

(Syllabus by the Court.)

Application by the St. Louis & San Francisco Railroad Company for a writ of prohibition against the Corporation Commis-

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sion of the state and J. E. Love and others as members thereof. Writ granted, but temporarily withheld.

W. F. Evans and *R. A. Kleinschmidt*; for plaintiff.

Charles West, Atty. Gen., and *Chas. L. Mobre*, Asst. Atty. Gen., for defendants.

HAYES, J. This is an original proceeding instituted in this court by plaintiff against the Corporation Commission, seeking a writ of prohibition to prevent the enforcement of certain portions of order numbered 482 of the Corporation Commission. On the 2d day of June, 1911, the Corporation Commission made an order whereby plaintiff is required to put in appliances for a grade crossing at Fourth avenue in the town of Stroud. The order also requires the plaintiff to remove certain of its stock pens situated where said avenue crosses plaintiff's railway tracks, and to make certain repairs in its depot platform, by building approaches there-to in safe condition and keeping the platform properly lighted and the premises free from stagnant water. From those portions of the order requiring plaintiff to establish a grade crossing and to remove its stock pens at Fourth avenue, plaintiff attempted to prosecute an appeal to this court; but upon motion of the Attorney General the same was dismissed. *St. L. & S. F. R. Co. v. Miller et al.*, 31 Okla. 801, 123 Pac. 1047. The ground upon which the motion was sustained as to the crossing ordered by the commission was that it ordered the establishment of a grade crossing in a public street, from which class of orders, under the rule established by several decisions of this court, no appeal lies. In this action it is alleged by plaintiff that, at the point where said crossing is ordered to be established by the order of the commission involved, no public street or way has ever been opened, and that none exists; that the fee-simple title to the land at said point is owned by plaintiff. Said allegations are not denied, but stand admitted.

It follows, under the rule announced by this court in *St. L. & S. F. R. Co. v. Love et al.*, 29 Okla. 523, 118 Pac. 259, approved and followed in *A., T. & S. F. Ry. Co. v. Love et al.*, 29 Okla. 739, 119 Pac. 207, that the Corporation Commission

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was without jurisdiction to determine the character of crossing to be provided and to require the installation thereof at the point where no highway or crossing has been lawfully established and opened over the right of way of the railway company, and that the writ of prohibition will issue to prohibit the enforcement of such order. The Attorney General recognizes the force of the foregoing decision, but seeks to avoid the effect thereof in this proceeding by contending that the order numbered 482 of the commission does not seek to require a grade crossing in a public street or way not opened up, and does not order said crossing for the convenience of the general public, but requires the same as a more convenient access for the patronizing public to plaintiff's depot; and that there is a necessity for such a crossing now, for the purpose of accommodating the traveling public passing over plaintiff's railway track and transacting business with plaintiff on the opposite sides of its line of railway.

The present attitude of the Attorney General's department is directly opposite to that assumed in *St. Louis & S. F. R. Co. v. Miller et al.*, *supra*, where the motion to dismiss was urged upon the theory that the order did not require a public convenience or facility to the patrons of the railway company and those portions of the public traveling on its line of railway. If the effect of the order were as now contended for by the Attorney General, it would be an appealable order and should have been reviewed by this court on appeal. After re-reading the record in *St. L. & S. F. R. Co. v. Miller et al.*, *supra*, and all the briefs in that case, as well as in this, we find no reason to recede from the construction of the order given by the Attorney General in his brief filed in the former case and adopted by the court. It is true that there is some language in the findings of fact of the Corporation Commission, made at the time the order was issued, that indicates that the commission may have had in view some convenience that would result from the order to that portion of the public who transact business at the depot of plaintiff; but the complaint filed with the commission, considered in connection with the evidence introduced at the hearing, makes it clear that what was sought and the primary purpose of the order was to require a

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public crossing at the point named in the order as a crossing in the public street for the benefit of the traveling public generally, and that such is the requirement of the order made, which, under the authority of *St. Louis & S. F. R. Co. v. Love et al.*, *supra*, the commission was without power to make, and may be restrained from enforcing by writ of prohibition.

But the writ will not issue, unless after notice of this decision to the Corporation Commission it shall be made to appear upon application and showing that there is a necessity therefor.

All the Justices concur.

SCHAFFER v. BALLOU.

No. 3730. Opinion Filed December 3, 1912.

(128 Pac. 498.)

1. **WORDS AND PHRASES**—"Issue." In its legal sense as used in statutes and wills and deeds and other instruments, "issue" means descendants; lineal descendants; offspring.
2. **DESCENT AND DISTRIBUTION**—"Issue"—Child by First Marriage. S., who had been twice married, died, leaving a widow, a child, the fruit of the first marriage, and an estate, the greater portion of which was acquired by the joint industry of the decedent and the wife by a second marriage during their coverture. Held, that the child of the first wife constituted "issue" within the meaning of the term as used in the second proviso of section 8985, Comp. Laws 1909, which reads: "Provided, in all cases where the property is acquired by the joint industry of husband and wife during coverture, and there is no issue, the whole estate to go to the survivor, at whose death if any of the said property remain, one-half of such property shall go to the heirs of the husband and one-half to the heirs of the wife, according to the right of representation."

(Syllabus by the Court.)

Error from District Court, Washita County;
Jas. R. Tolbert, Judge.

Action between Alpha Schafer and Carrie Ballou. From the judgment, Schafer brings error. Affirmed.

Brett & Rice, for plaintiff in error.

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Massingale & Duff, for defendant in error.

KANE, J. This was an action involving the heirship and distribution of the estate of E. W. Schafer, deceased. By a first marriage he had one child, Carrie Ballou, the defendant in error herein. By his second wife, Alpha Schafer, who survived him, he had no children. The evidence showed, and the court found, that all of the estate of the decedent, except about \$500, was acquired by the joint industry of husband and wife during the second marriage. The surviving wife, the plaintiff in error, contends that under section 8985, Comp. Laws 1909, she is entitled to a child's share of the part of the estate of the decedent acquired prior to the first marriage, and the whole of that acquired by the joint industry of the decedent and herself during their coverture. The part of the foregoing section of the statute necessary to a determination of the question involved reads as follows:

"When any person having title to any estate not otherwise limited by marriage contract dies without disposing of the estate by will, it descends and must be distributed in the following manner: First. If the decedent leave a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband, or wife and child, or issue of such child. If the decedent leave a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband or wife and child or issue of such child. If the decedent leave a surviving husband or wife, and more than one child living and the lawful issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his children, and to the lawful issue of any deceased child, by right of representation; but if there be no child of the decedent living at his death, the remainder goes to all of his lineal descendants; and if all the descendants are in the same degree of kindred to the decedent they share equally, otherwise they take according to the right of representation; provided, if decedent shall have been married more than once, the spouse at the time of death shall inherit of the property not acquired during coverture with such spouse only an equal part with each of the living children of decedent, and the lawful issue of any deceased child by right of representation. If the decedent leave no surviving husband or wife, but leaves issue, the whole estate goes to such issue, and if such issue consists of more than one child living or one child living, and the lawful issue of one or more

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deceased children, then the estate goes in equal shares to the children living or to the child living, and the issue of the deceased child or children by right of representation. Second. If the decedent leave no issue, the estate goes one-half to the surviving husband or wife, and the remaining one-half to the decedent's father or mother, or if he leave both father and mother to them in equal shares. If there be no father then one-half goes, in equal shares, to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation. If the decedent leave no issue, nor husband, nor wife, the estate must go to the father or mother, or if he leave both father and mother, to them in equal shares. Provided, in all cases where the property is acquired by the joint industry of husband and wife during coverture, and there is no issue, the whole estate to go to the survivor, at whose death if any of the said property remain, one-half of such property shall go to the heirs of the husband and one-half to the heirs of the wife, according to the right of representation."

The court below found, as a matter of law, that Carrie Ballou, the daughter by the first marriage, was entitled to share equally in the estate of her father, whether the same was acquired before or after his marriage with Alpha Schafer, and entered a decree awarding to Carrie Ballou one-half interest in said property. We think the judgment of the court below was correct. To our minds the statute furnishes very little, if any, support to the contention of counsel for plaintiff in error. The proviso relied upon by them provides that the whole property acquired by the joint industry of husband and wife during coverture, if there is no issue, shall go to the survivor. In this case, however, there was surviving issue—the daughter of the first marriage. How, then, can it be said that the surviving wife was entitled to take the whole estate, without reading into the statute words not written there by the Legislature?

"In its legal sense as used in statutes and wills and deeds and other instruments, issue means descendants, lineal descendants, offspring." (23 Cyc. 359, 360.)

It seems too clear for controversy that the children of the decedent, whether by the first or second wife, constitute issue as thus defined. Little more can be said. The statute is clear, and merely setting it out refutes the construction contended

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for by the plaintiff in error. Its purpose is to prevent the collateral kindred of a deceased married person from inheriting his property accumulated during coverture by the joint industry of husband and wife until after the death of the surviving spouse, and not to cut off his issue or lineal descendants.

Finding no error, the judgment of the court below is affirmed. All the Justices concur.

SCOTT *et al.* v. SIGNAL OIL CO.

No. 3876. Opinion Filed December 3, 1912.

(128 Pac. 694.)

1. **ESTOPPEL—Equitable Estoppel—Grounds.** A person may waive a right by conduct or acts which indicate an intention to relinquish it, or by such failure to insist upon it that the party is estopped to afterwards set it up against his adversary.
2. **INDIANS — Departmental Lease — Assignment — Consent of Lessor.** A departmental oil and gas lease was executed by a citizen of the Cherokee Nation to S., who thereafter assigned the same with the approval of the Secretary of the Interior, but without the consent of the lessor, to the Signal Oil Company, who immediately entered into possession of the leased premises and in due time, after the expenditure of a considerable sum of money, developed a producing gas well. The lessor was duly notified of the assignment of said lease and the approval thereof by the Secretary of the Interior and thereafter, for a period of several years, accepted without question the rentals and royalties due her by the terms of said lease. **Held,** that the lessor by her conduct waived her rights under the clause of the lease which provides: "And it is mutually understood and agreed that no sub-lease, assignment or transfer of this lease, or of any interest therein or thereunder, can be directly or indirectly made without the written consent thereto of the lessor and the Secretary of the Interior first had and obtained, and any such assignment or transfer made or attempted without such consent shall be void."
3. **MINES AND MINERALS—Leases—Registration.** The recordation laws of the state of Arkansas extended to and put in force in the Indian Territory do not require the assignment of an oil and gas lease executed by a citizen of the Cherokee Nation prior to statehood to be recorded in order to give it validity.

(Syllabus by the Court.)

Error from District Court, Washington County;
R. H. Hudson, Judge.

Opinion of the Court.

Action by the Signal Oil Company against Roxie A. Scott and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Norman Barker, for plaintiffs in error.

Rowland & Talbott and *Jas. A. Veasey*, for defendant in error.

KANE, J. This was a suit commenced by the defendant in error, plaintiff below, against the plaintiffs in error, defendants below, to enjoin them from interfering with certain rights which it claimed in a 40-acre tract of land under a departmental oil and gas lease. Upon trial to the court, a permanent order of injunction was decreed, as prayed for by the plaintiff, to reverse which this proceeding in error was commenced. The land in question is the allotment of Roxie A. Scott, a Cherokee citizen. The original lease was executed by her in favor of Charles B. Shaffer, and approved by the Secretary of the Interior on April 15, 1907. On the 3d day of May, 1907, Shaffer assigned the lease to the Signal Oil Company, which assignment was approved by the Secretary of the Interior on the 6th day of September, 1907. On March 7, 1911, the plaintiff in error Horton procured an oil and gas lease for the same premises from Roxie Scott under which he attempted to take possession, whereupon this suit was commenced.

The plaintiffs in error contend that the assignment of the lease by Shaffer to the oil company is void, because Roxie A. Scott did not give her written consent thereto, as required by a certain clause of the lease, which provides:

"And it is mutually understood and agreed that no sublease, assignment or transfer of this lease, or of any interest therein or thereunder, can be directly or indirectly made without the written consent thereto of the lessor and the Secretary of the Interior first had and obtained, and any such assignment or transfer made or attempted without such consent shall be void."

It is admitted that the assignment was made without the written consent of the lessor, and, if it were not for other circumstances which will be noticed hereafter, the case would be controlled by the cases of *Midland Oil Co. v. Turner*, 179 Fed.

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74, 102 C. C. A. 368, and *Turner v. Seep et al.* (C. C.) 167 Fed. 646, wherein it was held that:

"Where an oil and gas mining lease executed by an Indian in Indian Territory on a form prescribed by the Interior Department expressly provided that no sublease or assignment of any interest therein could be made without the written consent of the lessor, and the Secretary of the Interior, and any attempted assignment or transfer without such consent should be void, a subsequent regulation of the department which contained no requirement of the lessor's consent in such cases could not validate an assignment of such lease made without the lessor's consent."

But in the instant case plaintiff alleged that, under and in pursuance of the privileges granted by the terms of said lease and the said assignment, the plaintiff has entered upon the above-described land and drilled one producing gas well, which said gas well has been utilized for a period of ——— years prior to the filing of this suit; that the plaintiff has fully complied with all of the terms and conditions in said lease contained relative to the payment of advance royalties and annual rentals, and also has paid all gas rentals provided by the terms of said lease accruing on account of the gas well above referred to; that the defendant Roxie A. Scott has from time to time accepted advance royalties, annual rentals, and gas rentals that have accrued; and that said defendant at the time accepted said moneys with full knowledge of the ownership of said lease by the plaintiff and has thereby ratified, approved, and confirmed the assignment made by Charles B. Shaffer. To which the defendant answered that "she has never knowingly received or accepted any royalties from this plaintiff, but that on or about the 11th day of March, 1911, she received a check or voucher from the United States Indian agent for back royalty due upon said gas well of \$105.55." To which allegation the Signal Oil Company replied as follows:

"That said Roxie A. Scott was duly notified of the assignment of said lease by said Shaffer to this plaintiff prior to the approval of the same by the Secretary of the Interior, and that thereafter notice of the approval of said assignment to the plaintiff was sent to said Roxie A. Scott by the Indian agent, and

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that thereafter said Roxie A. Scott accepted the payment of certain gas royalties due under said lease by reason of the well drilled in on said land by the plaintiff, with knowledge of the fact that said royalties were paid by the plaintiff, as a result of which the defendant waived that provision of the lease requiring her consent as set out in the third paragraph of defendant's answer, and is estopped to declare a forfeiture of said lease for a violation of said term of said lease."

Upon the issue of estoppel the evidence was conflicting, but there was evidence reasonably tending to support all the allegations contained in the part of plaintiff's reply above set out. The court, after a full consideration of the evidence, found the issues in favor of the plaintiff. If, therefore, the facts alleged are sufficient to constitute an estoppel, the judgment of the court below must be affirmed, for there is no principle of law more firmly settled in this jurisdiction than that this court will not set aside the findings of the court below on a question of fact, where the evidence reasonably tends to support it. The evidence reasonably tends to show: That the lease was assigned on the 3d day of May, 1907, and that the assignment was approved by the Secretary of the Interior on the 6th day of September of the same year. That on the 17th day of February, 1908, D. H. Kelsey, the Indian agent, notified the lessor of said assignment through the United States mail by inclosing to her a triplicate copy of the approved assignment to the Signal Oil Company of the lease executed by her in favor of Charles B. Shaffer. That thereafter the lessor accepted rentals and royalties from the assignee in accordance with the terms of the lease, as follows: March 14, 1908, \$12; June 10, 1908, rental, \$40; January 13, 1909, royalties, \$26; September 8, 1909, royalties, \$50; November 16, 1911, royalties, \$105.55. It also appears that the assignee, on the faith of the approval of its assignment, in addition to the payment of rentals and royalties above set out, drilled a gas well on the land in question, out of which the royalties accrued.

It seems to us that the conduct of the lessor was so inconsistent with a purpose to stand upon her rights under the assignment clause of the lease that there is no room for a reasonable inference to the contrary.

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"The more usual manner of waiving a right is by conduct or acts which indicate an intention to relinquish the right, or by such failure to insist upon it that the party is estopped to afterward set it up against his adversary." (40 Cyc. 265, and cases cited.)

This is a clear case for the application of the doctrine of waiver by acts or conduct, and the court below very properly gave the plaintiff the benefit of the rule.

In a reply brief counsel for plaintiffs in error cite *Shulthis v. McDougal et al.*, 170 Fed. 529, 95 C. C. A. 615, as authority for the proposition "that the assignment held by the Signal Oil Company, defendant in error, if not recorded and unknown to her, was absolutely null and void, and if the same was known to her and was unknown to G. E. Horton, one of the plaintiffs in error, at the time he leased the property in question from Mrs. Scott, would convey him a good and sufficient title thereto and right to operate thereon and thereunder." We have examined that case and find it not to be in point. The recordation laws of the state of Arkansas extended to and put in force in the Indian Territory, there construed, do not require the assignment of an oil and gas lease executed by a citizen of the Cherokee Nation prior to statehood to be recorded in order to give it validity.

There are other assignments of error based upon the action of the court in rejecting and admitting evidence over the objections of the defendants. By section 5680, Comp. Laws 1909, "the court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reserved (reversed) or affected by reason of such error or defect." It is not apparent that any substantial rights of the defendants were prejudicially affected by the rulings complained of, and therefore, even if they were erroneous, this court is required to disregard them.

"The rule is well established that the improper admission or rejection of evidence, if not prejudicial to the party complaining, is not ground for reversal." (*Mullen v. Thaxton*, 24 Okla. 643, 104 Pac. 359.)

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On the whole, we are satisfied from the record before us that the court below committed no error that justifies a reversal of the judgment rendered. It is therefore affirmed.

All the Justices concur.

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CO. *et al.*

No. 3914. Opinion Filed December 3, 1912.

(128 Pac. 731.)

JUDGMENT—Vacation—Judgment by Consent. Where a judgment has been entered upon stipulations of the parties to a proceeding, and as entered was approved by all the parties to the proceeding and their counsel, the court is without authority, without the consent of all the parties, and commits no error in refusing to vacate and set aside such judgment upon motion of some of the parties, presented after the term at which the judgment was rendered, in the absence of any fraud on the part of the parties in procuring such consent judgment, and in the absence of clerical errors.

(Syllabus by the Court.)

Error from District Court, Okmulgee County;
Wade S. Stanfield, Judge.

Action by the Armour Packing Company and others against the United States Construction Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Orrick & Terrell, for plaintiff in error.

Thomas F. West and *R. A. Rogers*, for defendants in error.

HAYES, J. Defendants in error brought this action in the district court of Okmulgee county to recover the sum of \$—— for goods, wares, and merchandise furnished plaintiff in error. Defendants in error filed their application for the appointment of a receiver to take charge of the property of plaintiff in error, alleging that the property of plaintiff in error was being disposed of for the purpose of defrauding its creditors, which application was granted and a receiver appointed by the court. After an-

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swer was filed by plaintiff in error, and before the cause came up for trial, a stipulation, signed by all the parties in interest, was filed, agreeing upon a settlement of the case. The court entered judgment as per agreement in the stipulation, and the decree entered has the signed approval of all the parties to the action and of their attorneys. Thereafter plaintiff in error filed its motion to set aside the judgment entered by the court upon the stipulation, which motion was overruled. It is from the court's action in overruling plaintiff in error's motion to set aside the judgment that this appeal is prosecuted.

Several assignments of error are urged for reversal of the judgment, but there is one principle of law which conclusively determines this case, and that principle is that a court has no power, after stipulation for settlement, agreed to and signed by all the parties in interest, has been filed, and after judgment has been entered in accordance with such stipulation, to vacate and set aside or modify the judgment after the term at which it was rendered, in the absence of fraud between the parties agreeing to settlement by consent or stipulation, except for mistake, neglect, or omission of the clerk.

In *Morris v. Peyton*, 29 W. Va. 201, 11 S. E. 954, Mr. Justice Green, speaking for the court on the question of whether the court has power to vacate a decree entered by consent of the parties to the action, said:

"As such a decree is not the judgment of the court upon the merits of the case, but the act of the parties to the suit, it is obvious that it cannot be modified, set aside, or annulled by any order in the cause made by the court below without the consent of all the parties to the cause. * * * Nor could it be appealed from, nor modified by this court, unless, perhaps, it should be so entirely foreign to the matters in controversy in the cause that for this or some other reason the court below had no jurisdiction or authority to enter such decree by consent or otherwise."

The judgment in this case was the final ascertainment of the rights by consent of the parties to the suit, and cannot be changed by any subsequent order of the court without like consent. *Seiler v. Union Mfg. Co.*, 50 W. Va. 208, 40 S. E. 547.

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And to the same effect is the holding of the Supreme Court of Alabama, in *Alder et al. v. Van Kirk Land & Const. Co.*, 114 Ala. 551, 21 South. 490, 62 Am. St. Rep. 133, wherein it is said:

"In the absence of fraud in its procurement, and between parties *sui juris*, who are competent to make the consent, not standing in confidential relations to each other, a judgment or decree of a court having jurisdiction of the subject-matter, rendered by consent of parties, though without any ascertainment by the court of the truth of the facts averred, is, according to the great weight of American authority, as binding and conclusive between the parties and their privies as if the suit had been an adversary one, and the conclusions embodied in the decree had been rendered upon controverted issues of fact and a due consideration thereof by the court."

See, also, to the same effect, 2 Black on Judgm. sec. 705; Freeman on Judgm. sec. 330; *Walsh v. Walsh*, 116 Mass. 383, 17 Am. Rep. 162; *Nashville & C. R. Co. v. U. S.*, 113 U. S. 261, 5 Sup. Ct. 460, 28 L. Ed. 971; 23 Cyc. 733.

No attempt was made, after the parties entered into the stipulation consenting to the entry of judgment thereon, and before the court entered judgment, to show cause why judgment should not be entered as per stipulation. On the other hand, the decree entered had the approval at the time of all the parties, and no fraud is alleged or shown. We therefore hold that the judgment entered in this case was entered in accordance with the stipulation agreed to by all the parties in interest, and, in the absence of fraud on the part of the parties to the case, is final and conclusive as between the parties, and that the court committed no error in overruling the motion to vacate.

The judgment of the trial court is accordingly affirmed.

All the Justices concur.

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No. 3948. Opinion Filed December 3, 1912.

(128 Pac. 699.)

1. **CONSTITUTIONAL LAW—Due Process of Law—Judicial Hearing.** Chapter 52, Comp. Laws 1909, providing for the commitment of insane persons by a board known as "commissioners of insanity" to the insane hospital or asylum maintained by the state, does not violate the provisions of the due process clause of either the state or federal Constitution, since said chapter provides: "All persons confined as insane shall be entitled to the benefit of the writ of *habeas corpus*, and the question of insanity shall be decided at the hearing, and if the judge or court shall decide that the person is insane, such decision shall be no bar to the issuing of the writ the second time whenever it shall be alleged that such person has been restored to reason."

(a) The detention of such insane inmate except under proceedings by virtue of a valid statute can be justified on the ground alone that it is best for the care of such inmate or that it would be dangerous for her to be at large.

2. **HABEAS CORPUS—Insane Persons—Discharge.** For the purpose of the hearing, it being admitted that the person was not only at the time of commitment but is also now insane, whose release from the asylum was sought solely on the ground that the statute under which she was held was void, such party is not entitled, as a matter of right, to be discharged upon that ground alone.
3. **JURY—Right to Jury Trial.** The right of trial by jury declared inviolate by section 19, art. 2, of the Constitution, except as modified by it, means the right as it existed in the territory of Oklahoma at the time of the adoption of the Constitution.
4. **SAME—Insane Persons.** The law in force in the territory of Oklahoma at the time of the admission of the state did not give persons, charged with being insane for the purpose of being committed to an insane hospital or asylum of the state, a right of trial by jury on the issue as to insanity.

(Syllabus by the Court.)

Proceeding by Azillah Amanda Dagley for a writ of *habeas corpus*. Writ quashed, and petitioner remanded.

John Feland and *T. G. Chambers*, for relator.

Cottingham & Bledsoe, for respondent.

Opinion of the Court.

WILLIAMS, J. The petition of Elias Dagley in this case seeks to secure the discharge of his wife, Azillah Amanda Dagley, from the custody of Dr. D. W. Griffin, superintendent of the Oklahoma Sanitarium Company, of Norman, Okla., an institution for the confinement and protection of the insane of said state, under contract and supervision of the state. The response specifically charges full notice and opportunity to be heard, and the appearance in person of Mrs. Dagley before the insanity board. It is then charged that the husband of Mrs. Amanda Dagley did have notice and was present at the trial resulting in the commitment of his wife to the insane asylum, and had every opportunity to introduce evidence in her behalf. It is further alleged in said response that Mrs. Dagley was insane at the time she was committed by the insanity board, and is still insane. Therefore, for the purpose of this proceeding, it is admitted that Mrs. Amanda Dagley is now insane. Such being her condition, she is not entitled, as a matter of right, to be discharged, when the ground alone is that she is held under a void statute.

In *Denny v. Tyler*, 85 Mass. (3 Allen) 225, it is said:

"The infirmity of the argument urged by the learned counsel in support of the writ consists in assuming that the abstract truth that no one can be deprived of his liberty or imprisoned against his will is of universal application, and that this court is bound to interpose and discharge all persons who are subjected to any restraint which is not imposed by the judgment of their peers or the law of the land. But the great truth on which this argument is based, like all general rules and principles, is subject to many qualifications and limitations. Taken in its literal sense, it would render unlawful the restraint of a person under the delirium of a fever or in the paroxysm of a fit. Applied without reference to the paramount law of necessity and humanity, it would render impracticable the performance of many of the duties of domestic and social life. It is therefore to be taken with due limitations, and to be construed in a reasonable manner with reference to the practical concerns of life and the circumstances of each particular case. It certainly can have no legitimate application where it is shown that the person who is alleged to be imprisoned or restrained of his liberty is insane. In the eye of the law, such person has no will. He cannot be said to be capable of exercising an act of volition. In determining on his right to be set free from restraint, his will cannot,

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as in case of a sane person, be made a test by which to ascertain the legality of the custody which is claimed over him. The law in such case can look only to the question whether the restraint to which he is subjected is unnecessary and unreasonable; and if it is ascertained that it is not, then the judgment must be that the restraint is not illegal, because it is only such as sound reason and an intelligent will sanction and approve. Such we understand to have been the doctrine which has been heretofore applied by this court in a case similar to the one at bar, and which is briefly reported in 8 Law Reporter, 122."

The same court in *Re Dowell*, 169 Mass. 387, 47 N. E. 1033, 61 Am. St. Rep. 290, said:

"The only ground for the petitioner's discharge which is set forth in the petition or relied on in argument is that the provisions of statute under which he was committed are unconstitutional as being in violation of article 12 of the Declaration of Rights and of the fourteenth amendment to the Constitution of the United States. The former provides that no subject shall be deprived of his liberty but by the judgment of his peers or the law of the land; the latter that no state shall deprive any person of liberty without due process of law. So far as the Declaration of Rights is concerned, it has been twice determined that a person who is in fact insane is not entitled to be discharged from a hospital on *habeas corpus*, provided the court is satisfied that the restraint and treatment there will be beneficial to him. *In re Oakes*, (1845) 8 Law Rep. 122; *Denny v. Tyler*, 3 Allen [Mass.] 225. In both of these cases the person was committed without any previous hearing, and without the order of the judge. It was held that the provision of the Declaration of Rights is not of universal application, and that it does not entitle an insane person to be set at liberty, if restraint is proper under the circumstances of the particular case. In the present case it must be assumed, from the petition, report, and argument, that the petitioner is in fact insane, and that the restraint and treatment of the hospital are beneficial to him. The case therefore falls directly within the decisions cited."

The following authorities support the rule announced in *Re Dowell*, *supra*: *In re Boyett*, 136 N. C. 415, 48 S. E. 791, 67 L. R. A. 972, 103 Am. St. Rep. 944, 1 Ann. Cas. 729; *King v. Coate*, Lofft, 73-76; *Brookshaw v. Hopkins*, Lofft, 240; *In re Shuttleworth*, 9 Q. B. 651; *Rex v. Gourlay*, 7 B. & C. 669; *Anderson v. Burrows*, 4 C. & P. 210; *Rex v. Turlington*, 2 Burr.

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1115; *Rex v. Clarke*, 3 Burr. 1362; *Scott v. Wakem*, 3 F. & F. 328; *Symm v. Fraser*, 3 F. & F. 859; *Hall v. Semple*, 3 F. & F. 337; *Fletcher v. Fletcher*, 1 Ell. & Ell. 420; *Ex parte Greenwood*, 24 L. J. Q. B. 148; *Look v. Dean*, 108 Mass. 116, 11 Am. Rep. 323; *Colby v. Jackson*, 12 N. H. 526; *Davis v. Merrill*, 47 N. H. 208.

For the purpose of committal for treatment in an asylum, it is not necessary that, in addition to insanity, there should be evidence of danger to the lunatic or others beyond what is implied in the insanity itself. The detention of the inmate, except under proceedings by virtue of valid statutes, can be justified only on the ground that it is for her care or that it would be dangerous for her to be at large. *Lott v. Sweet*, 33 Mich. 308; *Van Deusen v. Newcomer*, 40 Mich. 142.

In *People ex rel. Peabody v. Chanler, Sheriff, et al.*, 133 App. Div. 159, 117 N. Y. Supp. 322, proceedings by writ of *habeas corpus* by the people of the state on relation of A. Russell Peabody in behalf of Harry K. Thaw against Robert W. Chanler, sheriff of the county of Dutchess, was under consideration. At page 163 of 133 App. Div., at page 325 of 117 N. Y. Supp., it is said:

"In *Dowdell's* case, 169 Mass. 387, 47 N. E. 1033, 61 Am. St. Rep. 290, the petitioner applied for his discharge from commitment in that the statute was unconstitutional because it did not require any notice to the insane person before the commitment was signed, and so violated the provisions of the Declaration of Rights that no subject shall be deprived of his liberty but by the judgment of his peers and the law of the land, and the provisions of the fourteenth amendment to the Constitution of the United States that no state shall deprive any person of liberty without due process of law. And the court said: 'The order of commitment settles nothing finally or conclusively against the person committed. It does not take from him the care or control of his property. It is not equivalent to the appointment of a guardian over him. *Leggate v. Clark*, 111 Mass. 308, 310. He is entitled, as a matter of right, to institute judicial proceedings under the statutes to determine the necessity and propriety of his confinement. He is not denied the same protection of the laws which is enjoyed by all other persons in the commonwealth under like circumstances. He is not, therefore, deprived of his

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liberty without due process of law, according to the judicial construction which has been put upon those words. * * * And the right to institute judicial proceedings under the statutes is a sufficient protection of the liberty of the subject to meet the constitutional requirements. * * *"

In *Sporza v. German Savings Bank*, 192 N. Y. 8, 84 N. E. 406, it is said:

"The proceedings thus provided for by the insanity law are in no wise designed as a substitute for those upon an inquisition *de lunatico inquirendo*. The purposes of the insanity law are protective merely, although an order for a commitment thereunder is described as 'adjudging such person to be insane.' The order is not, strictly speaking, a judgment at all, for it does not affect the status of the person alleged to be insane. This has been held in regard to a similar statute in Massachusetts, where it was said: 'The order of commitment settled nothing finally or conclusively against the person committed. It does not take from him the care or control of his property. It is not equivalent to the appointment of a guardian for him. He is entitled, as a matter of right, to institute judicial proceedings under the statute to determine the necessity and propriety of his confinement under the statute.' *Matter of Dowdell*, 169 Mass. 387, 47 N. E. 1033, 61 Am. St. Rep. 290."

In *Ex parte Scudamore*, 55 Fla. 211, 46 South. 279, it is said:

"In the case of *Dowdell, Petitioner*, 169 Mass. 387, 47 N. E. 1033, 61 Am. St. Rep. 290, it is held that the right to institute judicial proceedings under the statute is a sufficient protection of the liberty of the subject to meet these constitutional requirements, even though no sort of notice to the lunatic was given in the initial proceeding by which he was so adjudged. * * *"

The Dowdell case is cited also with approval in *Re Michael Gannon*, 16 R. I. 537, 18 Atl. 159, 5 L. R. A. 359, 27 Am. St. Rep. 759; *Ex parte Clark*, 86 Kan. 539, 121 Pac. 492; *In re Boyett, supra*.

In *Doyle, Petitioner*, 16 R. I. 537, 18 Atl. 159, 5 L. R. A. 359, 27 Am. St. Rep. 759, and *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 633, the statutes were declared void on the ground that they did not provide any mode of procedure whereby the person committed to an asylum could avail himself as of right, in his own behalf, for his discharge.

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In *Re Crosswell*, 28 R. I. 137, 66 Atl. 55, 13 Ann. Cas. 874, paragraph 3 of the syllabus is as follows:

“Such statute does not violate the provisions of the fourteenth amendment of the federal Constitution that no state shall deprive any person of life, liberty, or property without due process of law, or deny to any person the equal protection of the laws, since by statute the function of the writ of *habeas corpus* has been enlarged to apply to cases of commitments in insane hospitals, and it is made the duty of the court, upon application for such writ, ‘to inquire and determine as to the sanity or insanity or the necessity of restraint of the person confined, at the time such application was made,’ and to discharge the person confined if it appears, upon the verdict of a jury or in the opinion of the court, that such person is not insane or is not dangerous to himself or others, and ought not longer to be confined.”

After the decision in the Doyle case the Legislature of Rhode Island amended the law so as to extend the remedy of the *habeas corpus* in case of insanity commitments, so as to have the insanity of the person determined in such proceeding, and thus the Crosswell case is clearly in point in sustaining the validity of the Oklahoma statute. In the United States it seems to be clear that the courts of equity, in the absence of statutory provisions investing them with a lunacy jurisdiction, derive such a jurisdiction from the commonwealth *ex necessitate* for the protection of the persons and property of the citizens. 22 Cyc. p. 1120. But generally the jurisdiction over insane persons and their estates is committed by statute either to the courts of equity as such, or to other courts exercising general probate jurisdiction. The only remedy in a court of law for the discharge of persons insane is a writ of *habeas corpus*. *In re Bresee*, 82 Iowa, 573, 48 N. W. 991; *Commonwealth v. Lecky*, 1 Watts (Pa.) 66, 26 Am. Dec. 37; *Ex parte Bedard*, 106 Mo. 617, 17 S. W. 693.

Assuming that sections 3701-3720, Comp. Laws 1909, are in force in this state, though the same did not require notice preliminary to a commitment to the asylum, the same would not be violative of the state or federal Constitution for the reason that section 3717 provides for a judicial hearing. Said section is as follows:

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"All persons confined as insane shall be entitled to the benefit of the writ of *habeas corpus*, and the question of insanity shall be decided at the hearing, and if the judge or court shall decide that the person is insane, such decision shall be no bar to the issuing of the writ the second time whenever it shall be alleged that such person has been restored to reason."

The right of trial by jury declared inviolate by section 19, art. 2, of the Constitution (section 27, Williams' Ann. Const. Okla.), as modified by the Constitution itself, means the right as it existed in the territory of Oklahoma at the time of the adoption of the Constitution. *State ex rel. West v. Cobb*, 24 Okla. 662, 104 Pac. 361, 24 L. R. A. (N. S.) 639. Such right does not appear to have existed under the territorial form of government. See, also, following authorities holding that a jury trial in such cases is not essential: *State v. Linderholm*, 84 Kan. 603, 114 Pac. 857; *In re Latta*, 43 Kan. 533, 23 Pac. 655; *Ex parte Clark*, 86 Kan. 539, 121 Pac. 493; *County of Black Hawk v. Springer*, 58 Iowa, 417, 10 N. W. 792; *Nobles v. Georgia*, 168 U. S. 398, 18 Sup. Ct. 87, 42 L. Ed. 515; *In re Boyett*, *supra*; *In re Dowdell*, *supra*; *In re Ferrier*, 103 Ill. 367, 43 Am. Rep. 10; *In re Bresee*, 82 Iowa, 573, 48 N. W. 991; *Fant v. Buchanan* (Miss.) 17 South. 371; *Ex parte Scudamore*, 55 Fla. 211, 46 South. 279; *In re Le Donne*, 173 Mass. 550, 54 N. E. 244; *De Hart v. Condit*, 51 N. J. Eq. 611, 28 Atl. 603, 40 Am. St. Rep. 545; *People v. Baker*, 59 Misc. Rep. 359, 110 N. Y. Supp. 848; *In re Brown*, 39 Wash. 160, 81 Pac. 552, 1 L. R. A. (N. S.) 540, 109 Am. St. Rep. 868, 4 Ann. Cas. 488; *State v. Snell*, 46 Wash. 327, 89 Pac. 931, 9 L. R. A. (N. S.) 1191.

Under the present status of the record, the writ will be quashed and Mrs. Dagley remanded to the custody of the superintendent of the asylum. If the relator desires to make an issue on the question of her insanity, this writ of *habeas corpus* will be made returnable before a district judge of the county in which she resided at the time of her commitment to the asylum for a hearing on said issue.

All the Justices concur.

PIERCE COAL CO. *et al.* v. WALKER.

No. 4028. Opinion Filed December 3, 1912.

(128 Pac. 493.)

APPEAL AND ERROR—Final Judgment—What Constitutes. An order made vacating a judgment for the purpose of permitting a party against whom said judgment is rendered to prosecute or defend is interlocutory and not a final order from which an appeal lies to the Supreme Court.

(Syllabus by the Court.)

*Error from District Court, Pittsburg County;
Preslie B. Cole, Judge.*

Action by W. M. Walker, a minor, by J. R. Walker, his next friend, against the Pierce Coal Company and another. Judgment for defendants, and from an order vacating the same they bring error. Dismissed.

J. E. Whitehead, for plaintiffs in error.

W. T. Williams, for defendant in error.

HAYES, J. Defendant in error brought this action against plaintiffs in error in the court below to recover damages for personal injuries alleged to have been received while in the employment of plaintiffs in error. Plaintiffs in error filed their answer, denying the allegations contained in defendant in error's petition. Thereafter the cause was set down for trial, and defendant in error did not appear, and the court, without hearing any evidence on behalf of defendant, entered judgment by default against defendant in error. Thereafter defendant in error filed his motion to set aside and vacate the judgment and to reinstate the action, which motion was supported by affidavit. The court thereafter sustained the motion of defendant in error to reinstate the cause and set aside the judgment theretofore rendered. From the order of the court, reinstating the cause and setting aside and vacating the judgment theretofore entered, this appeal is attempted to be prosecuted.

In re Ballot Title for Initiative Petition No. 43, State Question No. 28.

Defendant in error has moved to dismiss the appeal, for the reason, among others, that the order is not a final order from which an appeal lies to this court. The motion should be sustained, for it is well settled by the decisions of this court that an order made vacating a judgment for the purpose of permitting a party against whom said judgment is rendered to prosecute or defend is interlocutory, and not a final order from which an appeal lies to the Supreme Court. *Maddle v. Beavers*, 24 Okla. 703, 104 Pac. 909; *Aetna Bldg. & Loan Ass'n v. Williams et al.*, 26 Okla. 191, 108 Pac. 1100; *W. L. Moody & Co. v. Freeman-Sipes Co. et al.*, 29 Okla. 390, 118 Pac. 134; *Smith v. Whitlow et al.*, 31 Okla. 758, 123 Pac. 1061.

The appeal is, accordingly, dismissed.

All the Justices concur.

***In re* BALLOT TITLE FOR INITIATIVE PETITION
NO. 43, STATE QUESTION NO. 28.**

No. 4061. Opinion Filed December 3, 1912.

(128 Pac. 681.)

APPEAL AND ERROR—Review—Abstract Questions. The Supreme Court will not decide abstract or hypothetical cases, disconnected from the granting of actual relief, or from the determination of which no practical relief can follow.

(Syllabus by the Court.)

Appeal from Ballot Title Filed by the Attorney General.

In the matter of preparing and filing a Ballot Title to State Question 28, Initiative Petition No. 43. From the action of the Attorney General, petitioner appeals. Dismissed.

Burford & Burford, for appellant.

Chas. West, Atty. Gen., and *Chas. L. Moore*, Asst. Atty. Gen., for appellee.

KANE, J. This is an appeal from the action of the Attorney General in the matter of preparing and filing a title to State

Abbott v. Rodgers.

Question No. 28, Initiative Petition No. 43, proposed for the purpose of repealing our present laws in relation to state, county, and precinct election boards, and in lieu thereof providing for state, county, and precinct election boards. It appears that the initiative petition has never been completed in the manner prescribed by law, in that it has never been filed with the Secretary of State with the requisite number of signers. The questions involved in the appeal have therefore become hypothetical. It has been often held by this court that:

"The Supreme Court will not decide abstract or hypothetical cases, disconnected from the granting of actual relief, or from the determination of which no practical relief can follow." (*Edwards et al., Board of Trustees, v. Welch*, 29 Okla. 335, 116 Pac. 791; *Cleveland-Trinidad Paving Co. v. Woods*, 29 Okla. 684, 119 Pac. 123; *Bryan v. Sullivan*, 29 Okla. 686, 119 Pac. 124.)

The appeal is therefore dismissed.

All the Justices concur.

ABBOTT v. RODGERS.

No. 4064. Opinion Filed December 3, 1912.

(128 Pac. 908.)

APPEAL AND ERROR—Case-Made—Filing Below. The case-made attached to the petition in error, or a copy thereof, not having been filed with the papers in the case in the court below, the same is a nullity, and cannot be considered in this court, for the purpose of reviewing matters complained of in the trial court.

(Syllabus by the Court.)

Error from Dewey County Court;
Harry H. Smith, Judge.

Action between Emily Abbott and Clay Rodgers. From the judgment, Abbott brings error. Dismissed.

Baker & Bloss, for plaintiff in error.

Robt. E. Adams, for defendant in error.

Grant v. Creed et al.

WILLIAMS, J. Counsel for defendant in error moves to dismiss this proceeding in error for the reason that neither the case-made attached to the petition in error nor a copy thereof was filed with the papers in the case below. The said motion was filed in this court on November 13, 1912, showing service on attorneys for the plaintiff in error on the 11th day of November, 1912. No response has been made to said motion.

Under the authority of *St. Louis, I. M. & So. Ry. Co. v. Burrow*, 33 Okla. 701, 127 Pac. 478, the motion must be sustained.

See, also, *Marple v. Farmers' & Merchants' Nat. Bank*, 28 Okla. 810, 115 Pac. 1124; *Oligschalager v. Grell*, 13 Okla. 632, 75 Pac. 1131.

The motion to dismiss this proceeding in error must therefore be sustained.

All the Justices concur.

GRANT v. CREED et al.

No. 4149. Opinion Filed December 3, 1912.

(128 Pac. 511.)

TIME—Sundays—Exclusion—Appeal. The judgment sought to be reviewed was rendered on December 30, 1911; the motion for new trial being filed and overruled on the same day. The proceeding in error was commenced on July 1, 1912. The 30th day of June, 1912, fell on Sunday. The six months in which a proceeding for reviewing said judgment may be commenced in this court expired on that day, which must be excluded. The proceeding being commenced on July 1, 1912, was within time.

(Syllabus by the Court.)

Error from District Court, Osage County;
R. H. Hudson, Judge.

Action between Charles Grant and Martin L. Creed and others. From the judgment, Grant brings error. Motion to dismiss overruled.

S. H. King, for plaintiff in error.

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A. S. Sands and Burwell, Crockett & Johnson, for defendants in error.

WILLIAMS, J. The judgment sought to be reviewed in this proceeding was rendered in the court below on December 30, 1911. The motion for a new trial was also filed and overruled on the same day.

It was essential, in order to have said judgment reviewed in this court, that the proceeding should be commenced here within six months from the date of the final order or the rendition of the judgment. *Holcombe v. Lawyers' Co-Op. Pub. Co.*, *post*.

"The time within which an act is to be done shall be computed by excluding the first day, and including the last; if the last day be Sunday it shall be excluded." (Section 6258, Comp. Laws 1909; section 4629, St. Okla. 1893.)

See, also, *Boynton Land, Mining & Inv. Co. v. Runyan*, 29 Okla. 306, 116 Pac. 809; *Southern Pine Lumber Co. et al. v. Ward et al.*, 16 Okla. 131, 85 Pac. 459; *County of Smith v. Labore*, 37 Kan. 480, 15 Pac. 577.

In *County of Smith v. Labore*, *supra*, it is said:

"Now if we exclude the first day in the present case, to wit, April 28, 1885, which was the day on which the judgment was rendered, then the year within which the case is to be brought to this court would commence on April 29, 1885, and it would not end until the last moment of April 28, 1886; hence, under the Civil Code, it is clear that this case was brought to this court within proper time."

This case is controlling on this court. If we exclude December 30th, the date on which the judgment was rendered, the six months within which the case is to be brought by proceeding in error to this court would commence on December 31, 1911, and the six months expire with the last day of June, 1912, but the 30th day of June, 1912, was Sunday, which is to be excluded. This proceeding in error having been commenced on July 1, 1912, was in time.

The motion to dismiss is therefore overruled.

All the Justices concur.

Miller v. Fryer.

*Error from District Court, Atoka County;
Robert M. Rainey, Judge.*

Action by C. W. Miller against A. J. Fryer. Judgment for defendant, and plaintiff brings error. Affirmed.

J. M. Humphreys, for plaintiff in error.

Winfield S. Farmer, for defendant in error.

HAYES, J. This is a suit in ejectment brought originally by plaintiff in error, C. W. Miller, against defendant in error, A. J. Fryer, for the possession of certain lands fully described in plaintiff's petition. After trial to the court without a jury, the court rendered judgment in favor of plaintiff for the possession of twenty acres of the land involved and against plaintiff, and in favor of defendant for the remaining 80 acres. From the judgment against plaintiff as to the 80 acres plaintiff prosecutes this appeal. Defendant, as to the judgment against him for the twenty acres, has made no complaint, either by appeal or cross-appeal.

The facts, briefly stated, are: That one William Butler and his wife, Adeline Butler, are Choctaw freedmen duly enrolled as such on the approved rolls of freedmen of the Choctaw Tribe of Indians. On the 21st and the 22d days of December, 1904, said Butler and his wife were allotted each 40 acres of land as their share of the tribal lands of the Choctaw Indians to which they were entitled as freedmen of said tribe. On the 22d day of December, 1904, Butler and his wife conveyed by warranty deed the lands allotted to them and now in controversy, to defendant, who caused the deed to be recorded. On the 27th day of July, 1908, Butler and his wife executed two separate deeds by which they conveyed to plaintiff the same lands, and his deeds were duly recorded. At the time of the execution of the deeds to defendant, he was then in possession of the lands conveyed, and has been continuously in possession thereof at all times since that date, and has been occupying and cultivating and using the same, and had been in exclusive possession thereof for more than one year prior to the time of the execution of the deeds, and had during such time collected the rents and profits therefrom. In fact, neither the

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Butlers nor plaintiff has ever been in actual possession of said lands at any time.

It is the contention of plaintiff that the deed executed to defendant is void, because the same is in violation of section 29 of the act of Congress, commonly known as the Curtis Act, approved June 28, 1898 (30 St. at L. p. 495, c. 517). It is his contention that the statute referred to makes the entire allotment of freedmen of the Chickasaw and Choctaw Nations a homestead and inalienable for a period of 21 years from the date of patent; that defendant's deed therefore is void and conveyed to him no title; that his (plaintiff's) deed was taken more than 60 days after the 27th day of May, 1908, upon which date there was enacted by Congress an act removing restrictions upon the power of said freedmen to alienate their allotted lands. Act May 27, 1908, c. 199, 35 St. at L. p. 312. Defendant, on the other hand, contends that said section 29 of the Curtis Act does not make the allotment of freedmen of the Choctaw and Chickasaw Nations a homestead, and that the act of Congress approved April 21, 1904 (33 St. at L. 189, c. 1402), removes all restrictions on the allotted lands of freedmen, and that the deed to defendant conveyed all the title of the allottees in said land, and that at the time of the execution of the deeds to plaintiff they had no title to convey to plaintiff. It is unnecessary, however, to determine these contentions of the respective parties; for, if we assume without deciding that section 29 of the Curtis Act makes the entire allotment of a Chickasaw or Choctaw freedman a homestead, and imposes restrictions upon its alienation for a period of 21 years, and defendant's deed, therefore, was void, because executed in violation of said restrictions upon the allottee's power to alienate, still the judgment of the trial court must be affirmed upon another ground.

On the 27th day of July, 1908, the date of the conveyance to plaintiff, there was in force in this state section 2215, Comp. Laws 1909, which provides:

"Every person who buys or sells, or in any manner procures, or makes or takes any promise or covenant to convey any pretended right or title to any lands or tenements, unless the grantor thereof, or the person making such promise or covenant has been in possession, or he and those by whom he claims have been in

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possession of the same, or of the reversion and remainder thereof, or have taken the rents and profits thereof for the space of one year before such grant, conveyance, sale, promise or covenant made, is guilty of a misdemeanor."

This section of the statute has received the consideration of this court, and been applied in several cases, all of which are referred to and reviewed in the recent case of *Martin v. Cox et al.*, 31 Okla. 543, 122 Pac. 511. In this case the court held that the foregoing statute, making it a misdemeanor to buy or sell any pretended right or title to land, where the grantor or those by whom he claims have not been in possession or taken the rents and profits thereof for the space of one year before such conveyance, is declaratory of the common law, and that a conveyance made in contravention thereof by the rightful owner as against the person holding adversely is void, and that it is not necessary in order that such shall be the result of the statute that the person holding shall hold under color of title at the time of the conveyance. It is sufficient if he was in possession adversely to plaintiff and his grantors.

Counsel for plaintiff in error contends that the foregoing statute does not operate to render the deed of plaintiff void, for the reason that, although defendant had been in possession of the land for more than one year prior to the conveyance thereof to plaintiff, defendant had not been in adverse possession for such period of time. He contends that there can be no adverse possession of the lands of an allottee upon the alienation of which there are restrictions imposed by the federal government; that no possession, however long and hostile it may be to the allottee, can, under the statutes of limitation, ripen into title. It is well settled that there can be no adverse possession against the federal government which can form the basis of title by estoppel or under the statutes of limitation; and it has been held that the same rule applies where the lands involved are lands that have been allotted to Indians with restrictions upon the alienation of title thereto by the Indians, so long as such restrictions upon alienation exist. *McGannon v. Straightlege*, 32 Kan. 524, 4 Pac. 1042; *O'Brien v. Bugbee*, 46 Kan. 1, 26 Pac. 428. But, where the restrictions upon the alienation of title by the Indian allottee have

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been removed, such allottee then stands upon an equal footing with other citizens of the state, and a title against him may be established upon an adverse possession maintained subsequent to the removal of restrictions for the period prescribed by the statute. *Davis v. Threlkeld*, 58 Kan. 763, 51 Pac. 226; *Forbes v. Higginbotham*, 44 Kan. 94, 24 Pac. 348.

But the contention of counsel is based upon a misconstruction of the provisions of the statute, which, except as to the penalty imposed, is declaratory of the common law. It was the fundamental doctrine of the English law of feuds that feoffment was void without livery of seisin, and without possession a man could not make livery of seisin. Out of this doctrine came the simple principle of the common law that a transfer of real property could not be valid unless the grantor had the capacity as well as the intention to deliver possession, which was an essential part of the title and the dominion over the property. 2 Black. Comm. 311; 4 Kent, 447. It was enacted by St. 32 Henry VIII, c. 9:

"That no person shall bargain or sell, or by any means obtain any pretended rights or titles, or take, promise, grant, or covenant to have any right or title to any hereditaments, unless the seller, his ancestors, or they from whom he claim, have been in possession of the same, or the reversion or remainder thereof, or taken the rents or profits thereof, for one whole year next before the bargain and sale, on pain that such seller shall forfeit the whole value of the hereditaments sold; and the buyer or taker, knowing the same, shall forfeit the value of the hereditaments so by him bought or taken, one-half of the said forfeiture to be to the king, and the other to him who will sue for the same."

Discussing this statute, Montague, C. J., said:

"In this point the statute has not altered the common law; for the common law before the statute was that he who was out of possession ought not to bargain, grant, or let his title; and, if he had done so, it should have been void, and then the statute was made in affirmance of the common law, and not in alteration of it; and all that the statute has done is it has added a greater penalty to that which was void by the common law before." (*Patridge v. Strange*, 1 Plow. 880.)

The common-law rule did not require, nor does the statute here involved require, as an element of its violation that the per-

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son in possession at the time of the conveyance shall have been in adverse possession for a period of one year. On the other hand, the statute is violated, not only if the grantor is out of possession, and there is some one in adverse possession at the time of the conveyance, but if the grantor is in possession, but has not been in actual or constructive possession in person or by those by whom he claims for the period of one year, or has taken the rents and profits thereof for said period of time. Whatever may be the character of defendant's possession before the removal of the restrictions upon the alienation by the allottees at the time this conveyance was made, plaintiff was not in possession. Defendant then was in adverse possession under the admitted facts in this record; and by reason of that fact the deeds executed by the allottees to plaintiff constituted the violation of the statute, and are, as between plaintiff and defendant in possession, void.

This statute, in our opinion, in no way conflicts with the federal act of May 27, 1908 (35 St. at L. p. 312, c. 199), which provides:

"All lands, including homesteads, of allottees of the Five Civilized Tribes, enrolled as intermarried whites, as freedmen and as mixed-blood Indians having less than half Indian blood, shall be free from all restrictions."

What was intended by this statute was to remove restrictions upon the alienation of their allotments by the classes of allottees named in the statute that have been imposed by the statutes and treaty provisions under which the allotments have been made and to leave such allottees free to convey their lands, subject to the laws of the state regulating conveyances of real estate. The statute of the state here involved does not render valid any deed made in violation of the prohibitions of the treaties against alienation, or operate to vest defendant with any title; but it says to the Indian allottee, as it says to the white citizen of the state:

"You cannot convey a pretended title while out of possession. You must obtain possession by means of the remedy the law affords before a conveyance can be made that will be valid against the person in possession claiming title adversely."

It may not be pertinent to refer to the policy of this law in support of the conclusion we here reach, but we cannot re-

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frain from saying that in our opinion it will not operate to the detriment of allottees upon which the federal government now imposes or has heretofore imposed restrictions upon their power to alienate their allotments. It is well known that the peaceable law-abiding small investor is loath to purchase titles upon which there is any cloud or about which there is any dispute, and, although conveyances made in violation of the statute prohibiting alienation are declared by the courts to be absolutely void, such conveyances have the effect to render the allottee's title in the land of less merchantable value; and only the speculator who can buy such land in large quantities and can afford the expense of litigation to clear up such titles will purchase the same, and as a result thereof the unwary Indian allottee who has conveyed in violation of the statute, when he is permitted to sell, finds his market greatly restricted by the clouded condition of his title and the adverse claims made under the void instruments he has executed. Under the operation of the statute here involved, he can convey his land only after he has cleared his title, and removed the adverse claimant from possession thereof, in which condition it will bring its full market value.

From the foregoing views, it follows that the judgment of the trial court should be, and is, affirmed.

All the Justices concur.

McCONNELL v. SECURITY STATE BANK *et al.*

No. 3062. Opinion Filed December 3, 1912.

(128 Pac. 683.)

APPEAL AND ERROR—Dismissal—Service of Summons. A petition in error will be dismissed on motion, even though the same is filed in this court within the time allowed under the statute, where no waiver of issuance and service of summons in error is had, and no praecipe for same is filed, and no summons issued or general appearance made within such time.

(Syllabus by the Court.)

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*Error from District Court, Woods County;
R. H. Loofbourrow, Judge.*

Action between R. N. McConnell and the Security State Bank and others. From the judgment, McConnell brings error. Dismissed.

Chas. H. Garnett and Ernest Chambers, for plaintiff in error.

Appleget & Herod, for defendants in error.

HAYES, J. Judgment was rendered in this cause on the 8th day of July, 1910. On the 4th day of January, 1911, plaintiff in error filed his motion to vacate the judgment and decree, which motion was on the 4th day of January, 1911, overruled. Petition in error and case-made were filed in this court on September 20, 1911. No waiver of issuance and service of summons in error and no præcipe for same has been filed, and no summons issued or general appearance made up to this date. Defendants in error have moved to dismiss the appeal, for the reason that no summons in error has been issued, served, or waived, and that no præcipe therefor has been filed within the time required by law.

The motion is well taken; and upon the authority of *City of Lawton v. Connor*, 25 Okla. 398, 106 Pac. 647, *Chicago, R. I. & P. Ry. Co. v. Bradham*, 24 Okla. 250, 103 Pac. 591, and *McMurtry v. Byrd et al.*, 23 Okla. 597, 101 Pac. 1117, the appeal is dismissed.

All the Justices concur.

Title Guaranty & Surety Co. v. Slinker.

TITLE GUARANTY & SURETY CO. v. SLINKER.

No. 3093. Opinion Filed December 3, 1912.

(128 Pac. 698.)

AFFIRMANCE ON AUTHORITY OF PRIOR OPINION. Affirmed on the authority of the *Title Guaranty & Surety Co. v. Wm. Raymond Slinker, a Minor, by His Legal Guardian, A. Neely*, ante, 128 Pac. 696.

(Syllabus by the Court.)

*Error from the District Court, Bryan County;
Summers Hardy, Judge.*

Action by Helen Slinker, a minor, by her legal guardian, A. Neely, against the Title Guaranty & Surety Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Kyle & Newman, and *Edward C. Griesel*, for plaintiff in error.

Chas. E. McPherrren, *Chas. P. Abbott*, and *Chas. B. Cochran*, for defendant in error.

KANE, J. This is an action upon a guardian's bond, commenced by Helen Slinker, a minor, by her legal guardian, A. Neely, against the former guardian and the Title Guaranty & Surety Company, surety upon his bond. The questions involved are identical with those decided by this court in the case of the *Title Guaranty & Surety Co. v. Wm. Raymond Slinker, a Minor, by his Legal Guardian, A. Neely*, ante, 128 Pac. 696.

Upon the authority of that case, the judgment in this case is affirmed.

All the Justices concur.

In re Assessment of Osage & Oklahoma Gas Co.

In re ASSESSMENT OF OSAGE & OKLAHOMA GAS CO.

No. 3106. Opinion Filed December 3, 1912.

(128 Pac. 692.)

1. **TAXATION—Assessment—Appeal to Supreme Court—Trial De Novo.** On appeal from the action of the State Board of Equalization in assessing the property of a public service corporation, the issues are confined to those presented to the Board of Equalization; but the trial here is *de novo*, and evidence may be introduced by both parties; and in doing so they are not confined to the evidence introduced before the Board of Equalization.
2. **SAME—Property of Corporation—Assessment—Equalization.** Evidence examined and found sufficient to sustain the report of the referee.

(Syllabus by the Court.)

Appeal from State Board of Equalization.

In the matter of the assessment of the property of the Osage & Oklahoma Gas Company for taxation by the State Board of Equalization. From an order making such assessment, the Gas Company appeals. From report of referee assessing cash value of the Company's property, the state moves to dismiss. Report confirmed.

Flynn, Chambers, Lowe & Richardson, for Osage & Oklahoma Gas Co.

Chas. West, Atty. Gen., and *W. C. Reeves*, Asst. Atty. Gen., for the State.

HAYES, J. This is an appeal by the Osage & Oklahoma Gas Company, a corporation, hereinafter referred to as the company, from an action of the State Board of Equalization taken on the 2d day of August, 1911, assessing the property of the company for taxation for the year 1911 at \$973,472. At the trial in this court, which was *de novo*, the cause was referred to a referee, agreed upon and selected by the parties, to hear the evidence and report his findings of fact thereon, which he has done, and the cause is now before us upon the motion of the company to confirm the

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report of the referee and upon the motion of the state to dismiss the appeal and upon its objections and exceptions to the referee's report.

On the 17th day of April, 1911, the company filed with the State Auditor, as it is required by statute to do, its annual return, upon which the State Board of Equalization, on the 16th day of May, 1911, made a tentative assessment of its property for taxation for said year in the sum of \$973,472. To this assessment the company made objections and was granted a hearing before the State Board of Equalization on the 28th day of June, 1911; after which hearing, the board overruled all of its objections and adhered to its former assessment. From this order of the board this proceeding is prosecuted.

The sole and only question involved in the appeal, from the standpoint of the company, is the value of the property belonging to the company subject to taxation in this state for the year 1911. In making up its annual return to the State Auditor, the company listed therein only its physical properties for taxation and did not include its bills receivable, cash on hand, or its intangible property, such as franchises, contracts for the sale of gas, or gas lease contracts. The State Board of Equalization, in arriving at the value of the company's property and assessing it for taxation, took into consideration these items of property owned by the company which had been omitted from its annual report. At the hearing before the State Board of Equalization and at the trial in this court it is admitted by the officers of the company that it has a bills receivable account, cash on hands, and franchises of value. It is insisted by the Attorney General on behalf of the state that under the statute (section 1, c. 87, Sess. Laws, 1910), which provides that no matter shall be reviewed on appeal which was not presented to the board appealed from, the company cannot now complain of the increased valuation at which the State Board of Equalization has assessed its property over the amount returned by the company in its annual return, because some of the items of property considered by the board in making up that assessed valuation consist of property not listed in the

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return, and for that reason the appeal should be dismissed. We do not understand such to be the effect of the statute, which was considered and construed in *Re Western Union Telegraph Co.* 29 Okla. 483, 118 Pac 376. In that case it was held that an appeal lies to this court from the action of the State Board of Equalization in assessing property; that under the foregoing statute the issues on appeal are confined to those presented to the Board of Equalization; but that the trial here is *de novo*, and the evidence may be introduced by both parties, and in doing so they are not confined to the evidence introduced before the state board. The State Board of Equalization did not assess the company's property by separate items, but made its assessment thereof in an aggregate amount, including in such assessment all the items not so returned. At the hearing on the tentative assessment of the board, evidence was heard on the value of the entire property. The objection made to the assessment by the company was as to the aggregate assessment, and the evidence introduced was all for the purpose of showing that the aggregate sum at which the property of the company had been assessed was excessive. Upon such an issue any evidence that tended to show the real value of the property of the company was competent and could be introduced either by the company or by the state at the hearing before the State Board of Equalization, and is likewise competent on appeal before this court. The question of fact the company now seeks to have determined is the same issue that was considered at the hearing before the board, and the cause should not be dismissed.

The referee in his report finds the fair cash value of the company's property to be \$400,000. At the hearing before the referee the evidence introduced consisted of two witnesses, who are the secretary and treasurer and the general manager of the company, respectively, and both of whom testified on behalf of the company. The state introduced no evidence whatever. By the evidence of these witnesses it is established that the company is a corporation, organized under the laws of the state of Delaware in 1905, but that all the property owned by it is located in this state. It has an authorized capital of \$1,500,000, of which

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\$450,000 has been paid in. All of its properties were originally bought by it from two certain persons for the sum of \$450,000 in cash, and \$8,000 credit secured by a first mortgage on the properties of the company. The money required to pay the cash consideration was derived from a sale of stock at \$36 per share, the par value of which was \$100 per share. The original property included oil and gas leases on large tracts of lands in the Osage Nation and the business of oil production of about 2,000 barrels per day, and a gas business consisting of a small plant in Tulsa with about 500 consumers. After doing considerable drilling for oil throughout the territory upon which it had leases, the company, in February, 1906, sold all of its oil leases and the oil production of its wells and equipment, including everything pertaining to its oil business, for a consideration of \$450,000 in cash and the assumption by the purchaser of the \$8,000 indebtedness incurred as a part of the original purchase price by the company. A special dividend out of the proceeds of this sale in the sum of \$30 per share was paid to the stockholders, leaving \$90,000 of the original investment of the company still invested in its properties. After this sale the properties of the company consisted of its gas franchise in the city of Tulsa, a gas plant operated in said city and some of its suburbs, together with a pipe line leading from the gas fields to the city, and gas leases and gas rights in certain tracts of land. Its gas plant has from time to time been enlarged, repaired, and improved; but the total value of the physical property of the company cannot be ascertained by adding to the original cost thereof the sums of money that have been subsequently expended upon the plant, for the reason that much of the original plant has been taken out and rebuilt, such as the old pipe lines in the streets, which were replaced as the city has grown and its streets were paved, and some of the property taken out was an entire loss. The testimony of the secretary and treasurer of the company is that on February 1, 1911, the fair cash value of the company's pipe lines, distributing plant, and their accessories which compose the physical properties of the company was \$139,067.53, and this testimony stands uncontradicted and unimpeached. On the same date the appellant had \$18,997.47 in cash,

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and accounts receivable in the sum of \$22,557.23. The same witness testified that its franchise for distributing gas to the consumers in the city of Tulsa was of the value of \$25,000, and was carried upon the books of the company at that sum. The foregoing items make up an aggregate sum of \$205,622.23. In addition to the foregoing property, however, the company owns some gas lease contracts in undeveloped fields which expire in 1916, and has contracts with certain gas companies to furnish them gas at stipulated prices. There is no evidence in the record as to the valuation of these separate items of property, but the secretary and treasurer stated that he regarded the value of the entire property of the company, including gas leases and all the company's contracts and its franchises, to be \$400,000.

The foregoing, in substance, constitutes all the evidence introduced at the hearing before the referee, except that it is shown that during the year ending June 30, 1910, the company made a net earning of \$65,911.41, which is equivalent to six per cent. upon a valuation of approximately \$1,098,532. Upon this fact, principally, it is stated by the Attorney General the valuation of the State Board should be sustained. The earning capacity of property may be considered in arriving at its fair value, but its value cannot be determined by that circumstance alone. It would be a very unreliable method to select any given year and determine the value of any given piece of property by the dividends earned that year; for some years are more productive of profits than others in almost all lines of business, and, if a fruitful year should be selected, a valuation based upon such estimate would probably far exceed the real value of the property. On the other hand, if a poor year were selected, a sum much less than the real value would result. There is no evidence tending to show what the annual earnings of the company from its plant have been, nor its franchise to furnish gas to the residents of the city of Tulsa, but is engaged in competition with another company operating under a similar franchise, and its present franchise expires in 1928 and limits the company in the right it grants to it to furnish natural probable earnings in the future. It does not own an exclusive gas only. Taking into consideration all these facts and the cir-

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cumstances that the state has not offered any evidence whatever to contradict the evidence offered in behalf of the company, we are of the opinion that the report of the referee as to the total taxable value of appellant's property is amply sustained by the evidence and should not be disturbed.

The order of this court is that the report of the referee be confirmed, and judgment entered accordingly.

TURNER, C. J., and WILLIAMS and KANE, JJ., concur;
DUNN, J., not participating.

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No. 3311. Opinion Filed December 3, 1912.

(128 Pac. 688.)

1. **GUARDIAN AND WARD—Contracts—Confirmation by Court—Necessity.** By sections 3506, 3509, and 3511 of Mansf. Dig. of Ark. 1884 (sections 2402, 2405, and 2407, Ind. Ter. Ann. St. 1899), all leases of minors' lands for a term of years by the guardian (not made by virtue of sections 3498 and 3500, Mansf. Dig., sections 2394 and 2396, Ind. Ter. Ann. St.) are required to be reported by him and confirmed by the court. In the absence of such report and confirmation, no right under the lease passes to the purchaser; but where a guardian made application to the court, setting up the facts showing that the ward's real estate should be leased for investment, and that L. offered to take the lease for a certain period under specified terms, and prayed for an order of court directing him to enter into such lease with the said L. under said terms, and the court granted the order prayed for by the guardian and directed the guardian to execute the lease to L., held, that such order constituted a confirmation of the lease, and, if irregular, such irregularity would not vitiate the lease on collateral attack. Following *Spade v. Morton et al.*, 28 Okla. 384, 114 Pac. 724.
2. **INDIANS—Lands—Lease by Guardian.** Leases of allotments of Indian minors in the Five Civilized Tribes confirmed and approved by the trial court in that jurisdiction since April 26, 1906, are not subject to the approval or disapproval of the Secretary of the Interior; but the orders of the court confirming and approving them are final.
3. **APPEAL AND ERROR—Review—Questions of Fact—Trial by Court.** Where a case is tried by a lower court without a jury, and special findings of fact are made, based partly upon oral testimony, such findings, as a rule, are conclusive upon any disputed and doubtful questions of fact.

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4. **GUARDIAN AND WARD—Lands of Ward—Lease—Statutory Provisions.** Mansf. Dig. sec. 3502 (section 2398, Ind. Ter. Ann. St. 1899), as in force in the Indian Territory, empowered the United States courts in the Indian Territory, sitting as probate courts, to authorize the guardian to lease the lands of a minor according to the best interests of the ward, subject to the approval of the court; and sections 3509, 3510, and 3511 of said digest (sections 2405, 2406, and 2407, Ind. Ter. Ann. St. 1899) authorize the probate court to lease for purposes of reinvestment or putting proceeds on interest. **Held**, that, while at common law all leases by a guardian to extend beyond the term of the guardianship were voidable, a lease of a minor's land pursuant to an order of the probate court was valid, though it extended beyond minority. Following *Beauchamp v. Bertig*, 90 Ark. 351, 119 S. W. 75, 23 L. R. A. (N. S.) 659.

(a) The United States courts in the Indian Territory, sitting as courts of chancery, had authority to approve such leases extending beyond the minority of the ward.

(Syllabus by the Court.)

Error from District Court, Washington County;
R. H. Hudson, Judge.

Action by James C. Cowles, Jr., against Alva C. Lee and another. Judgment for defendants, and plaintiff brings error. Affirmed.

J. P. O'Meara, for plaintiff in error.

A. F. Vandeventer, J. R. Charlton, and John J. Shea, for defendants in error.

WILLIAMS, J. This proceeding in error is to review the judgment of the trial court in an action wherein the plaintiff in error, as plaintiff, sued the defendants in error, as defendants, to cancel a certain oil and gas lease on a certain alienable tract of land, purporting to extend fifteen years, and beyond the minority of the said plaintiff.

The following grounds are set up for cancellation: (1) Lease not confirmed by order of court. (2) Failure to pay royalties. (3) Failure to sink wells. (4) Assignment of the lease without the consent of the Secretary of the Interior. (5) Plaintiff, having become of age, elected not to ratify, but disaffirm, said lease, which extended beyond his minority.

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Judgment was entered against the defendant Lee by default. Afterwards, on leave of the court, by amended petition, the Belvy Oil Company, to whom said lease had been assigned prior to the commencement of said action, was made a party. On application, the development for oil under this lease was stayed during the pendency of the action. Under the issues as framed a trial was had before the court, and judgment rendered in favor of the Belvy Oil Co.

In *Spade v. Morton et al.*, 28 Okla. 384, 114 Pac. 724, the sale was sought to be avoided on collateral attack, on the ground that it was never reported by the guardian or confirmed by the court. In the opinion it is said:

"There was, in this case, no formal report of the sale and confirmation thereof after the original order; but the guardian and the court appear to have acted under the impression that the statute authorizes a private sale; and when the guardian made his application for the original order he did not ask to be permitted to offer generally the land for sale, or to receive offers to purchase, but he submitted to the court a specific proposition from the defendant Morton to buy the land at a stipulated price, and prayed the court to authorize and direct him to sell the land to said Morton at said price. The order of the court finds that defendant Morton has offered to purchase the land at a specified price, which the court finds to be an adequate and sufficient price for the land, and the highest and best bid received by the guardian, and directs the guardian not to sell the land and report his action thereon to the court, but to execute to said Morton a deed of conveyance, conveying him the land for the consideration offered. This order, in our opinion, was intended by the court and all parties thereto to constitute the final consummation of the sale; and a subsequent order by the court, expressing its sanction of the sale, could, for that purpose, add nothing to the force of the language of the original order. The order did not direct the guardian to offer for bids, but to convey the land by the execution of a deed. When the proposition of defendant Morton was presented to the court by the application, and the court accepted and approved the same, the contract was finally consummated. If such method of consummating a sale was irregular, the irregularity could have been reviewed on appeal, but cannot be considered here. * * * In the case at bar the bid was reported and was accepted by the court, and the deed was executed; and, however irregular the making of the order in this form may

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be, the effect thereof in this proceeding cannot be, we think, subject to much doubt."

At the time of the assignment of the lease, to wit, on August 10, 1910, the said James C. Cowles, Jr., was 21 years of age, having reached said period on the 10th day of July, 1910. This lease having been entered into under the laws as they existed prior to the erection of the state, under *Spade v. Morton et al.*, *supra*, it was valid, unless it is rendered invalid on account of the term extending beyond the minority of said minor, or being assigned to the Belvy Oil Company without the approval of the Secretary of the Interior, or some other forfeiture of its terms.

The restrictions against alienation having been removed from said minor's allotment by virtue of the act of April 26, 1906 (34 St. at L. p. 137, c. 1876), after said date leases of allotments of minors in the Five Civilized Tribes, approved by the trial courts in that jurisdiction, are not subject to the approval or disapproval of the Secretary of the Interior; but the orders of the court approving them are final. *Morrison et al. v. Burnette et al.*, 83 C. C. A. 391, 154 Fed. 617; *Jennings v. Wood et al.*, 192 Fed. 657; *Kolachny v. Galbreath et al.*, 26 Okla. 772, 110 Pac. 902, 38 L. R. A. (N. S.) 451; *Eldred et al. v. Okmulgee Loan & Trust Co.*, 22 Okla. 742, 98 Pac. 929.

The United States court for the Northern District of the Indian Territory, at Tahlequah, prior to the erection of the state exercising both probate and chancery powers, had the power to authorize a guardian to lease the lands of his ward for a period extending beyond his minority. *Huston et al. v. Cobleigh*, 29 Okla. 793, 119 Pac. 416, which followed *Beauchamp v. Bertig et al.*, 90 Ark. 351, 119 S. W. 75, 23 L. R. A. (N. S.) 659. See, also, *Ricardi et al. v. Gaboury et al.*, 115 Tenn. 484, 89 S. W. 98; *Marsh et al. v. Reed et al.*, 184 Ill. 263, 56 N. E. 306.

The plaintiff is foreclosed as to all questions of forfeiture of the lease, on allegations of failure of the lessee to comply with its terms, by the finding of the trial court. *Hausam v. Parker*, 31 Okla. 399, 121 Pac. 1063.

It is not essential to pass on the question as to whether the court should have permitted the plaintiff to amend his petition,

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as, under *Spade v. Morton et al.*, *supra*, the order authorizing the specific lease of the land under specified terms amounted to a confirmation.

Counsel for plaintiff in error insists that, although the supervision of the Secretary of the Interior over said land had been withdrawn by the act of April 26, 1906, yet the lease provided:

"It is mutually understood and agreed that this indenture of lease shall in all respects be subject to the rules and regulations heretofore or that may hereafter be lawfully prescribed by the Secretary of the Interior relative to oil and gas leases in the Cherokee Nation, and that this lease, or any interests therein, shall not, by working or drilling contract or otherwise, or the use thereof, directly or indirectly, be sublet, assigned or transferred without the consent of the Secretary of the Interior first obtained, and that should he or his sublessees, heirs, executors, administrators, successors or assigns violate any of the covenants, stipulations, or provisions of this lease, or any of the regulations, or fail for the period of 60 days to pay the stipulated royalties provided for herein, then the Secretary of the Interior, after ten days from notice to the parties hereto, shall have the right to avoid this indenture of lease and cancel the same, when all the rights, franchises and privileges of the lessee, his sublessees, heirs, executors, administrators, successors or assigns hereunder, shall cease and end without resorting to the court and without further proceedings, and the lessors shall be entitled to immediate possession of the leased land and the permanent improvements located thereon."

As the Secretary of the Interior has not elected to declare a forfeiture of the lease, it is not essential to determine whether, under its contractual terms, he could have done so in this particular case.

This lease provides for a ten per cent. royalty, and the guardian is authorized to collect same and all funds arising therefrom.

Error in the judgment of the trial court must be shown by the plaintiff in error. All intendments and presumptions are in favor of said judgment.

The judgment of the lower court is affirmed.

All the Justices concur.

McKain v. J. I. Case Threshing Mach. Co.

MCKAIN v. J. I. CASE THRESHING MACH. CO.

No. 3333. Opinion Filed December 3, 1912.

(128 Pac. 895.)

APPEAL AND ERROR—Affirmance—Failure to Prosecute. Judgment was rendered in the court below against a party for a certain sum, and a proceeding in error instituted in this court, which such party fails to prosecute. Said judgment having been superseded, on motion, the same will be affirmed.

(Syllabus by the Court.)

*Error from Osage County Court;
C. T. Bennett, Judge.*

Action by the J. I. Case Threshing Machine Company against E. L. McKain. Judgment for plaintiff, and defendant brings error. Affirmed.

Grinstead, Mason & Scott, for plaintiff in error.

Leahy & MacDonald and *Shartel, Keaton & Wells*, for defendant in error.

WILLIAMS, J. This cause comes on to be heard upon the motion of the defendant in error to affirm the judgment of the court below.

Upon the authority of *Merchants' & Planters' Ins. Co. v. Crane et al.*, 31 Okla. 713, 123 Pac. 1127, the judgment of the lower court is affirmed.

All the Justices concur.

Bradley et al. v. Chestnutt-Gibbons Grocer Co.

BRADLEY *et al.* v. CHESTNUTT-GIBBONS GROCER CO.

No. 3414. Opinion Filed December 3, 1912.

(128 Pac. 498.)

APPEAL AND ERROR—Review—Objections Not Raised Below. Where an action is tried in the trial court before a judge pro tem., elected by the members of the bar under the provisions of the statute for the election of judges pro tem., and no question is there raised as to the power or authority of such judge pro tem. to hear and determine the case, or as to the regularity of his election, and all the parties proceed to trial without objection or exception thereto, the regularity of his election and his authority to hear and determine the case cannot be questioned for the first time in this court on appeal.

(Syllabus by the Court.)

*Error from Superior Court, Muskogee County;**L. J. Roach, Special Judge.*

Action by the Chestnutt-Gibbons Grocer Company against Cass M. Bradley and O. Durant. Judgment for plaintiff, and defendants bring error. Affirmed.

Gibson & Thurman, for plaintiffs in error.*Irwin Donovan*, for defendant in error.

HAYES, J. Defendant in error brought this action in the court below against plaintiffs in error to recover on a promissory note the sum of \$2,000 and interest at eight per cent. per annum. The regular elected judge of said court announced his disqualification to sit in said cause, and a special judge, after due notice was given to all concerned, was duly elected by the members of the bar, as provided by law, to try said cause. The cause was tried to the court without a jury, who found the issues in favor of defendant in error and rendered judgment accordingly. Plaintiffs in error filed a motion for a new trial, which was overruled by the court, and the case is now before us on petition in error and case-made.

Plaintiffs in error, in their brief, urge but one ground for reversal of the judgment, and that is: "Irregularity in the proceed-

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ings for the election of the special judge." The record before us does not disclose that any objections or exceptions to the election of the special judge were made in the court below. Defendant in error has asked that the judgment of the court below be affirmed, for the reason that plaintiffs in error have raised, for the first time on appeal, the question of irregularity in the election of the special judge; and the record therefore presents nothing to review. The motion to affirm should be sustained. It is a well-settled rule of law that where parties try their case before a special judge, or a judge *pro tem.*, and no objection is made or exceptions saved in the court below as to the authority of the judge to try the case, all objections to the authority of the special judge will be assumed by the appellate court to have been waived; and said objection cannot be heard for the first time on appeal. *Higby v. Ayres*, 14 Kan. 332; *Vandever et al. v. Vandever et al.*, 3 Metc. (60 Ky.) 137; *Fenster v. Woodfill*, 23 Ind. 493; *Greenwood v. State*, 116 Ind. 485, 19 N. E. 333. See, also, 11 Encyc. of Plead. & Prac. p. 793, and authorities there cited.

The judgment of the trial court is affirmed.

All the Justices concur.

ST. LOUIS & S. F. R. CO. v. CORPORATION COMMISSION OF OKLAHOMA *et al.*

No. 3703. Opinion Filed December 3, 1912.

(128 Pac. 496.)

PROHIBITION—Railroads—Highway Crossings—Installation—Power of Corporation Commission. Where no highway or crossing has been lawfully established or opened over the right of way of a railway company, the Corporation Commission has no jurisdiction to determine the character of crossing to be provided at such a point and require its installation; and where in such a case it makes an order requiring a public crossing to be installed, a writ of prohibition may issue to prevent its enforcement.

(Syllabus by the Court.)

Application by the St. Louis & San Francisco Railroad Company for a writ of prohibition against the Corporation Commis-

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sion of the state and J. E. Love and others as members thereof. Writ granted, but temporarily withheld.

W. F. Evans and *R. A. Kleinschmidt*; for plaintiff.

Charles West, Atty. Gen., and *Chas. L. Moore*, Asst. Atty. Gen., for defendants.

HAYES, J. This is an original proceeding instituted in this court by plaintiff against the Corporation Commission, seeking a writ of prohibition to prevent the enforcement of certain portions of order numbered 482 of the Corporation Commission. On the 2d day of June, 1911, the Corporation Commission made an order whereby plaintiff is required to put in appliances for a grade crossing at Fourth avenue in the town of Stroud. The order also requires the plaintiff to remove certain of its stock pens situated where said avenue crosses plaintiff's railway tracks, and to make certain repairs in its depot platform, by building approaches thereto in safe condition and keeping the platform properly lighted and the premises free from stagnant water. From those portions of the order requiring plaintiff to establish a grade crossing and to remove its stock pens at Fourth avenue, plaintiff attempted to prosecute an appeal to this court; but upon motion of the Attorney General the same was dismissed. *St. L. & S. F. R. Co. v. Miller et al.*, 31 Okla. 801, 123 Pac. 1047. The ground upon which the motion was sustained as to the crossing ordered by the commission was that it ordered the establishment of a grade crossing in a public street, from which class of orders, under the rule established by several decisions of this court, no appeal lies. In this action it is alleged by plaintiff that, at the point where said crossing is ordered to be established by the order of the commission involved, no public street or way has ever been opened, and that none exists; that the fee-simple title to the land at said point is owned by plaintiff. Said allegations are not denied, but stand admitted.

It follows, under the rule announced by this court in *St. L. & S. F. R. Co. v. Love et al.*, 29 Okla. 523, 118 Pac. 259, approved and followed in *A., T. & S. F. Ry. Co. v. Love et al.*, 29 Okla. 739, 119 Pac. 207, that the Corporation Commission

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was without jurisdiction to determine the character of crossing to be provided and to require the installation thereof at the point where no highway or crossing has been lawfully established and opened over the right of way of the railway company, and that the writ of prohibition will issue to prohibit the enforcement of such order. The Attorney General recognizes the force of the foregoing decision, but seeks to avoid the effect thereof in this proceeding by contending that the order numbered 482 of the commission does not seek to require a grade crossing in a public street or way not opened up, and does not order said crossing for the convenience of the general public, but requires the same as a more convenient access for the patronizing public to plaintiff's depot; and that there is a necessity for such a crossing now, for the purpose of accommodating the traveling public passing over plaintiff's railway track and transacting business with plaintiff on the opposite sides of its line of railway.

The present attitude of the Attorney General's department is directly opposite to that assumed in *St. Louis & S. F. R. Co. v. Miller et al.*, *supra*, where the motion to dismiss was urged upon the theory that the order did not require a public convenience or facility to the patrons of the railway company and those portions of the public traveling on its line of railway. If the effect of the order were as now contended for by the Attorney General, it would be an appealable order and should have been reviewed by this court on appeal. After re-reading the record in *St. L. & S. F. R. Co. v. Miller et al.*, *supra*, and all the briefs in that case, as well as in this, we find no reason to recede from the construction of the order given by the Attorney General in his brief filed in the former case and adopted by the court. It is true that there is some language in the findings of fact of the Corporation Commission, made at the time the order was issued, that indicates that the commission may have had in view some convenience that would result from the order to that portion of the public who transact business at the depot of plaintiff; but the complaint filed with the commission, considered in connection with the evidence introduced at the hearing, makes it clear that what was sought and the primary purpose of the order was to require a

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public crossing at the point named in the order as a crossing in the public street for the benefit of the traveling public generally, and that such is the requirement of the order made, which, under the authority of *St. Louis & S. F. R. Co. v. Love et al.*, *supra*, the commission was without power to make, and may be restrained from enforcing by writ of prohibition.

But the writ will not issue, unless after notice of this decision to the Corporation Commission it shall be made to appear upon application and showing that there is a necessity therefor.

All the Justices concur.

SCHAFFER v. BALLOU.

No. 3730. Opinion Filed December 3, 1912.

(128 Pac. 498.)

1. **WORDS AND PHRASES**—"Issue." In its legal sense as used in statutes and wills and deeds and other instruments, "issue" means descendants; lineal descendants; offspring.
2. **DESCENT AND DISTRIBUTION**—"Issue"—**Child by First Marriage.** S., who had been twice married, died, leaving a widow, a child, the fruit of the first marriage, and an estate, the greater portion of which was acquired by the joint industry of the decedent and the wife by a second marriage during their coverture. **Held**, that the child of the first wife constituted "issue" within the meaning of the term as used in the second proviso of section 8985, Comp. Laws 1909, which reads: "Provided, in all cases where the property is acquired by the joint industry of husband and wife during coverture, and there is no issue, the whole estate to go to the survivor, at whose death if any of the said property remain, one-half of such property shall go to the heirs of the husband and one-half to the heirs of the wife, according to the right of representation."

(Syllabus by the Court.)

Error from District Court, Washita County;
Jas. R. Tolbert, Judge.

Action between Alpha Schafer and Carrie Ballou. From the judgment, Schafer brings error. Affirmed.

Brett & Rice, for plaintiff in error.

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Massingale & Duff, for defendant in error.

KANE, J. This was an action involving the heirship and distribution of the estate of E. W. Schafer, deceased. By a first marriage he had one child, Carrie Ballou, the defendant in error herein. By his second wife, Alpha Schafer, who survived him, he had no children. The evidence showed, and the court found, that all of the estate of the decedent, except about \$500, was acquired by the joint industry of husband and wife during the second marriage. The surviving wife, the plaintiff in error, contends that under section 8985, Comp. Laws 1909, she is entitled to a child's share of the part of the estate of the decedent acquired prior to the first marriage, and the whole of that acquired by the joint industry of the decedent and herself during their coverture. The part of the foregoing section of the statute necessary to a determination of the question involved reads as follows:

"When any person having title to any estate not otherwise limited by marriage contract dies without disposing of the estate by will, it descends and must be distributed in the following manner: First. If the decedent leave a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband, or wife and child, or issue of such child. If the decedent leave a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband or wife and child or issue of such child. If the decedent leave a surviving husband or wife, and more than one child living and the lawful issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his children, and to the lawful issue of any deceased child, by right of representation; but if there be no child of the decedent living at his death, the remainder goes to all of his lineal descendants; and if all the descendants are in the same degree of kindred to the decedent they share equally, otherwise they take according to the right of representation; provided, if decedent shall have been married more than once, the spouse at the time of death shall inherit of the property not acquired during coverture with such spouse only an equal part with each of the living children of decedent, and the lawful issue of any deceased child by right of representation. If the decedent leave no surviving husband or wife, but leaves issue, the whole estate goes to such issue, and if such issue consists of more than one child living or one child living, and the lawful issue of one or more

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deceased children, then the estate goes in equal shares to the children living or to the child living, and the issue of the deceased child or children by right of representation. Second. If the decedent leave no issue, the estate goes one-half to the surviving husband or wife, and the remaining one-half to the decedent's father or mother, or if he leave both father and mother to them in equal shares. If there be no father then one-half goes, in equal shares, to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation. If the decedent leave no issue, nor husband, nor wife, the estate must go to the father or mother, or if he leave both father and mother, to them in equal shares. Provided, in all cases where the property is acquired by the joint industry of husband and wife during coverture, and there is no issue, the whole estate to go to the survivor, at whose death if any of the said property remain, one-half of such property shall go to the heirs of the husband and one-half to the heirs of the wife, according to the right of representation."

The court below found, as a matter of law, that Carrie Ballou, the daughter by the first marriage, was entitled to share equally in the estate of her father, whether the same was acquired before or after his marriage with Alpha Schafer, and entered a decree awarding to Carrie Ballou one-half interest in said property. We think the judgment of the court below was correct. To our minds the statute furnishes very little, if any, support to the contention of counsel for plaintiff in error. The proviso relied upon by them provides that the whole property acquired by the joint industry of husband and wife during coverture, if there is no issue, shall go to the survivor. In this case, however, there was surviving issue—the daughter of the first marriage. How, then, can it be said that the surviving wife was entitled to take the whole estate, without reading into the statute words not written there by the Legislaure?

"In its legal sense as used in statutes and wills and deeds and other instruments, issue means descendants, lineal descendants, offspring." (23 Cyc. 359, 360.)

It seems too clear for controversy that the children of the decedent, whether by the first or second wife, constitute issue as thus defined. Little more can be said. The statute is clear, and merely setting it out refutes the construction contended

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for by the plaintiff in error. Its purpose is to prevent the collateral kindred of a deceased married person from inheriting his property accumulated during coverture by the joint industry of husband and wife until after the death of the surviving spouse, and not to cut off his issue or lineal descendants.

Finding no error, the judgment of the court below is affirmed. All the Justices concur.

SCOTT *et al.* v. SIGNAL OIL CO.

No. 3876. Opinion Filed December 3, 1912.

(128 Pac. 694.)

1. **ESTOPPEL—Equitable Estoppel—Grounds.** A person may waive a right by conduct or acts which indicate an intention to relinquish it, or by such failure to insist upon it that the party is estopped to afterwards set it up against his adversary.
2. **INDIANS—Departmental Lease—Assignment—Consent of Lessor.** A departmental oil and gas lease was executed by a citizen of the Cherokee Nation to S., who thereafter assigned the same with the approval of the Secretary of the Interior, but without the consent of the lessor, to the Signal Oil Company, who immediately entered into possession of the leased premises and in due time, after the expenditure of a considerable sum of money, developed a producing gas well. The lessor was duly notified of the assignment of said lease and the approval thereof by the Secretary of the Interior and thereafter, for a period of several years, accepted without question the rentals and royalties due her by the terms of said lease. **Held,** that the lessor by her conduct waived her rights under the clause of the lease which provides: "And it is mutually understood and agreed that no sub-lease, assignment or transfer of this lease, or of any interest therein or thereunder, can be directly or indirectly made without the written consent thereto of the lessor and the Secretary of the Interior first had and obtained, and any such assignment or transfer made or attempted without such consent shall be void."
3. **MINES AND MINERALS—Leases—Registration.** The recordation laws of the state of Arkansas extended to and put in force in the Indian Territory do not require the assignment of an oil and gas lease executed by a citizen of the Cherokee Nation prior to statehood to be recorded in order to give it validity.

(Syllabus by the Court.)

Error from District Court, Washington County;
R. H. Hudson, Judge.

Opinion of the Court.

Action by the Signal Oil Company against Roxie A. Scott and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Norman Barker, for plaintiffs in error.

Rowland & Talbott and *Jas. A. Veasey*, for defendant in error.

KANE, J. This was a suit commenced by the defendant in error, plaintiff below, against the plaintiffs in error, defendants below, to enjoin them from interfering with certain rights which it claimed in a 40-acre tract of land under a departmental oil and gas lease. Upon trial to the court, a permanent order of injunction was decreed, as prayed for by the plaintiff, to reverse which this proceeding in error was commenced. The land in question is the allotment of Roxie A. Scott, a Cherokee citizen. The original lease was executed by her in favor of Charles B. Shaffer, and approved by the Secretary of the Interior on April 15, 1907. On the 3d day of May, 1907, Shaffer assigned the lease to the Signal Oil Company, which assignment was approved by the Secretary of the Interior on the 6th day of September, 1907. On March 7, 1911, the plaintiff in error Horton procured an oil and gas lease for the same premises from Roxie Scott under which he attempted to take possession, whereupon this suit was commenced.

The plaintiffs in error contend that the assignment of the lease by Shaffer to the oil company is void, because Roxie A. Scott did not give her written consent thereto, as required by a certain clause of the lease, which provides:

"And it is mutually understood and agreed that no sublease, assignment or transfer of this lease, or of any interest therein or thereunder, can be directly or indirectly made without the written consent thereto of the lessor and the Secretary of the Interior first had and obtained, and any such assignment or transfer made or attempted without such consent shall be void."

It is admitted that the assignment was made without the written consent of the lessor, and, if it were not for other circumstances which will be noticed hereafter, the case would be controlled by the cases of *Midland Oil Co. v. Turner*, 179 Fed.

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74, 102 C. C. A. 368, and *Turner v. Seep et al.* (C. C.) 167 Fed. 646, wherein it was held that:

"Where an oil and gas mining lease executed by an Indian in Indian Territory on a form prescribed by the Interior Department expressly provided that no sublease or assignment of any interest therein could be made without the written consent of the lessor, and the Secretary of the Interior, and any attempted assignment or transfer without such consent should be void, a subsequent regulation of the department which contained no requirement of the lessor's consent in such cases could not validate an assignment of such lease made without the lessor's consent."

But in the instant case plaintiff alleged that, under and in pursuance of the privileges granted by the terms of said lease and the said assignment, the plaintiff has entered upon the above-described land and drilled one producing gas well, which said gas well has been utilized for a period of ——— years prior to the filing of this suit; that the plaintiff has fully complied with all of the terms and conditions in said lease contained relative to the payment of advance royalties and annual rentals, and also has paid all gas rentals provided by the terms of said lease accruing on account of the gas well above referred to; that the defendant Roxie A. Scott has from time to time accepted advance royalties, annual rentals, and gas rentals that have accrued; and that said defendant at the time accepted said moneys with full knowledge of the ownership of said lease by the plaintiff and has thereby ratified, approved, and confirmed the assignment made by Charles B. Shaffer. To which the defendant answered that "she has never knowingly received or accepted any royalties from this plaintiff, but that on or about the 11th day of March, 1911, she received a check or voucher from the United States Indian agent for back royalty due upon said gas well of \$105.55." To which allegation the Signal Oil Company replied as follows:

"That said Roxie A. Scott was duly notified of the assignment of said lease by said Shaffer to this plaintiff prior to the approval of the same by the Secretary of the Interior, and that thereafter notice of the approval of said assignment to the plaintiff was sent to said Roxie A. Scott by the Indian agent, and

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that thereafter said Roxie A. Scott accepted the payment of certain gas royalties due under said lease by reason of the well drilled in on said land by the plaintiff, with knowledge of the fact that said royalties were paid by the plaintiff, as a result of which the defendant waived that provision of the lease requiring her consent as set out in the third paragraph of defendant's answer, and is estopped to declare a forfeiture of said lease for a violation of said term of said lease."

Upon the issue of estoppel the evidence was conflicting, but there was evidence reasonably tending to support all the allegations contained in the part of plaintiff's reply above set out. The court, after a full consideration of the evidence, found the issues in favor of the plaintiff. If, therefore, the facts alleged are sufficient to constitute an estoppel, the judgment of the court below must be affirmed, for there is no principle of law more firmly settled in this jurisdiction than that this court will not set aside the findings of the court below on a question of fact, where the evidence reasonably tends to support it. The evidence reasonably tends to show: That the lease was assigned on the 3d day of May, 1907, and that the assignment was approved by the Secretary of the Interior on the 6th day of September of the same year. That on the 17th day of February, 1908, D. H. Kelsey, the Indian agent, notified the lessor of said assignment through the United States mail by inclosing to her a triplicate copy of the approved assignment to the Signal Oil Company of the lease executed by her in favor of Charles B. Shaffer. That thereafter the lessor accepted rentals and royalties from the assignee in accordance with the terms of the lease, as follows: March 14, 1908, \$12; June 10, 1908, rental, \$40; January 13, 1909, royalties, \$26; September 8, 1909, royalties, \$50; November 16, 1911, royalties, \$105.55. It also appears that the assignee, on the faith of the approval of its assignment, in addition to the payment of rentals and royalties above set out, drilled a gas well on the land in question, out of which the royalties accrued.

It seems to us that the conduct of the lessor was so inconsistent with a purpose to stand upon her rights under the assignment clause of the lease that there is no room for a reasonable inference to the contrary.

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"The more usual manner of waiving a right is by conduct or acts which indicate an intention to relinquish the right, or by such failure to insist upon it that the party is estopped to afterward set it up against his adversary." (40 Cyc. 265, and cases cited.)

This is a clear case for the application of the doctrine of waiver by acts or conduct, and the court below very properly gave the plaintiff the benefit of the rule.

In a reply brief counsel for plaintiffs in error cite *Shulthis v. McDougal et al.*, 170 Fed. 529, 95 C. C. A. 615, as authority for the proposition "that the assignment held by the Signal Oil Company, defendant in error, if not recorded and unknown to her, was absolutely null and void, and if the same was known to her and was unknown to G. E. Horton, one of the plaintiffs in error, at the time he leased the property in question from Mrs. Scott, would convey him a good and sufficient title thereto and right to operate thereon and thereunder." We have examined that case and find it not to be in point. The recordation laws of the state of Arkansas extended to and put in force in the Indian Territory, there construed, do not require the assignment of an oil and gas lease executed by a citizen of the Cherokee Nation prior to statehood to be recorded in order to give it validity.

There are other assignments of error based upon the action of the court in rejecting and admitting evidence over the objections of the defendants. By section 5680, Comp. Laws 1909, "the court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reserved (reversed) or affected by reason of such error or defect." It is not apparent that any substantial rights of the defendants were prejudicially affected by the rulings complained of, and therefore, even if they were erroneous, this court is required to disregard them.

"The rule is well established that the improper admission or rejection of evidence, if not prejudicial to the party complaining, is not ground for reversal." (*Mullen v. Thaxton*, 24 Okla. 643, 104 Pac. 359.)

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On the whole, we are satisfied from the record before us that the court below committed no error that justifies a reversal of the judgment rendered. It is therefore affirmed.

All the Justices concur.

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CO. *et al.*

No. 3914. Opinion Filed December 3, 1912.

(128 Pac. 731.)

JUDGMENT—Vacation—Judgment by Consent. Where a judgment has been entered upon stipulations of the parties to a proceeding, and as entered was approved by all the parties to the proceeding and their counsel, the court is without authority, without the consent of all the parties, and commits no error in refusing to vacate and set aside such judgment upon motion of some of the parties, presented after the term at which the judgment was rendered, in the absence of any fraud on the part of the parties in procuring such consent judgment, and in the absence of clerical errors.

(Syllabus by the Court.)

*Error from District Court, Okmulgee County;
Wade S. Stanfield, Judge.*

Action by the Armour Packing Company and others against the United States Construction Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Orrick & Terrell, for plaintiff in error.

Thomas F. West and *R. A. Rogers*, for defendants in error.

HAYES, J. Defendants in error brought this action in the district court of Okmulgee county to recover the sum of \$—— for goods, wares, and merchandise furnished plaintiff in error. Defendants in error filed their application for the appointment of a receiver to take charge of the property of plaintiff in error, alleging that the property of plaintiff in error was being disposed of for the purpose of defrauding its creditors, which application was granted and a receiver appointed by the court. After an-

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swer was filed by plaintiff in error, and before the cause came up for trial, a stipulation, signed by all the parties in interest, was filed, agreeing upon a settlement of the case. The court entered judgment as per agreement in the stipulation, and the decree entered has the signed approval of all the parties to the action and of their attorneys. Thereafter plaintiff in error filed its motion to set aside the judgment entered by the court upon the stipulation, which motion was overruled. It is from the court's action in overruling plaintiff in error's motion to set aside the judgment that this appeal is prosecuted.

Several assignments of error are urged for reversal of the judgment, but there is one principle of law which conclusively determines this case, and that principle is that a court has no power, after stipulation for settlement, agreed to and signed by all the parties in interest, has been filed, and after judgment has been entered in accordance with such stipulation, to vacate and set aside or modify the judgment after the term at which it was rendered, in the absence of fraud between the parties agreeing to settlement by consent or stipulation, except for mistake, neglect, or omission of the clerk.

In *Morris v. Peyton*, 29 W. Va. 201, 11 S. E. 954, Mr. Justice Green, speaking for the court on the question of whether the court has power to vacate a decree entered by consent of the parties to the action, said:

"As such a decree is not the judgment of the court upon the merits of the case, but the act of the parties to the suit, it is obvious that it cannot be modified, set aside, or annulled by any order in the cause made by the court below without the consent of all the parties to the cause. * * * Nor could it be appealed from, nor modified by this court, unless, perhaps, it should be so entirely foreign to the matters in controversy in the cause that for this or some other reason the court below had no jurisdiction or authority to enter such decree by consent or otherwise."

The judgment in this case was the final ascertainment of the rights by consent of the parties to the suit, and cannot be changed by any subsequent order of the court without like consent. *Seiler v. Union Mfg. Co.*, 50 W. Va. 208, 40 S. E. 547.

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And to the same effect is the holding of the Supreme Court of Alabama, in *Alder et al. v. Van Kirk Land & Const. Co.*, 114 Ala. 551, 21 South. 490, 62 Am. St. Rep. 133, wherein it is said:

“In the absence of fraud in its procurement, and between parties *sui juris*, who are competent to make the consent, not standing in confidential relations to each other, a judgment or decree of a court having jurisdiction of the subject-matter, rendered by consent of parties, though without any ascertainment by the court of the truth of the facts averred, is, according to the great weight of American authority, as binding and conclusive between the parties and their privies as if the suit had been an adversary one, and the conclusions embodied in the decree had been rendered upon controverted issues of fact and a due consideration thereof by the court.”

See, also, to the same effect, 2 Black on Judgm. sec. 705; Freeman on Judgm. sec. 330; *Walsh v. Walsh*, 116 Mass. 383, 17 Am. Rep. 162; *Nashville & C. R. Co. v. U. S.*, 113 U. S. 261, 5 Sup. Ct. 460, 28 L. Ed. 971; 23 Cyc. 733.

No attempt was made, after the parties entered into the stipulation consenting to the entry of judgment thereon, and before the court entered judgment, to show cause why judgment should not be entered as per stipulation. On the other hand, the decree entered had the approval at the time of all the parties, and no fraud is alleged or shown. We therefore hold that the judgment entered in this case was entered in accordance with the stipulation agreed to by all the parties in interest, and, in the absence of fraud on the part of the parties to the case, is final and conclusive as between the parties, and that the court committed no error in overruling the motion to vacate.

The judgment of the trial court is accordingly affirmed.

All the Justices concur.

Ex parte Dagley.

Ex parte DAGLEY.

No. 3948. Opinion Filed December 3, 1912.

(128 Pac. 699.)

1. **CONSTITUTIONAL LAW—Due Process of Law—Judicial Hearing.** Chapter 52, Comp. Laws 1909, providing for the commitment of insane persons by a board known as “commissioners of insanity” to the insane hospital or asylum maintained by the state, does not violate the provisions of the due process clause of either the state or federal Constitution, since said chapter provides: “All persons confined as insane shall be entitled to the benefit of the writ of *habeas corpus*, and the question of insanity shall be decided at the hearing, and if the judge or court shall decide that the person is insane, such decision shall be no bar to the issuing of the writ the second time whenever it shall be alleged that such person has been restored to reason.”

(a) The detention of such insane inmate except under proceedings by virtue of a valid statute can be justified on the ground alone that it is best for the care of such inmate or that it would be dangerous for her to be at large.
2. **HABEAS CORPUS—Insane Persons—Discharge.** For the purpose of the hearing, it being admitted that the person was not only at the time of commitment but is also now insane, whose release from the asylum was sought solely on the ground that the statute under which she was held was void, such party is not entitled, as a matter of right, to be discharged upon that ground alone.
3. **JURY—Right to Jury Trial.** The right of trial by jury declared inviolate by section 19, art. 2, of the Constitution, except as modified by it, means the right as it existed in the territory of Oklahoma at the time of the adoption of the Constitution.
4. **SAME—Insane Persons.** The law in force in the territory of Oklahoma at the time of the admission of the state did not give persons, charged with being insane for the purpose of being committed to an insane hospital or asylum of the state, a right of trial by jury on the issue as to insanity.

(Syllabus by the Court.)

Proceeding by Azillah Amanda Dagley for a writ of *habeas corpus*. Writ quashed, and petitioner remanded.

John Feland and *T. G. Chambers*, for relator.

Cottingham & Bledsoe, for respondent.

Opinion of the Court.

WILLIAMS, J. The petition of Elias Dagley in this case seeks to secure the discharge of his wife, Azillah Amanda Dagley, from the custody of Dr. D. W. Griffin, superintendent of the Oklahoma Sanitarium Company, of Norman, Okla., an institution for the confinement and protection of the insane of said state, under contract and supervision of the state. The response specifically charges full notice and opportunity to be heard, and the appearance in person of Mrs. Dagley before the insanity board. It is then charged that the husband of Mrs. Amanda Dagley did have notice and was present at the trial resulting in the commitment of his wife to the insane asylum, and had every opportunity to introduce evidence in her behalf. It is further alleged in said response that Mrs. Dagley was insane at the time she was committed by the insanity board, and is still insane. Therefore, for the purpose of this proceeding, it is admitted that Mrs. Amanda Dagley is now insane. Such being her condition, she is not entitled, as a matter of right, to be discharged, when the ground alone is that she is held under a void statute.

In *Denny v. Tyler*, 85 Mass. (3 Allen) 225, it is said:

"The infirmity of the argument urged by the learned counsel in support of the writ consists in assuming that the abstract truth that no one can be deprived of his liberty or imprisoned against his will is of universal application, and that this court is bound to interpose and discharge all persons who are subjected to any restraint which is not imposed by the judgment of their peers or the law of the land. But the great truth on which this argument is based, like all general rules and principles, is subject to many qualifications and limitations. Taken in its literal sense, it would render unlawful the restraint of a person under the delirium of a fever or in the paroxysm of a fit. Applied without reference to the paramount law of necessity and humanity, it would render impracticable the performance of many of the duties of domestic and social life. It is therefore to be taken with due limitations, and to be construed in a reasonable manner with reference to the practical concerns of life and the circumstances of each particular case. It certainly can have no legitimate application where it is shown that the person who is alleged to be imprisoned or restrained of his liberty is insane. In the eye of the law, such person has no will. He cannot be said to be capable of exercising an act of volition. In determining on his right to be set free from restraint, his will cannot,

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as in case of a sane person, be made a test by which to ascertain the legality of the custody which is claimed over him. The law in such case can look only to the question whether the restraint to which he is subjected is unnecessary and unreasonable; and if it is ascertained that it is not, then the judgment must be that the restraint is not illegal, because it is only such as sound reason and an intelligent will sanction and approve. Such we understand to have been the doctrine which has been heretofore applied by this court in a case similar to the one at bar, and which is briefly reported in 8 Law Reporter, 122."

The same court in *Re Dowell*, 169 Mass. 387, 47 N. E. 1033, 61 Am. St. Rep. 290, said:

"The only ground for the petitioner's discharge which is set forth in the petition or relied on in argument is that the provisions of statute under which he was committed are unconstitutional as being in violation of article 12 of the Declaration of Rights and of the fourteenth amendment to the Constitution of the United States. The former provides that no subject shall be deprived of his liberty but by the judgment of his peers or the law of the land; the latter that no state shall deprive any person of liberty without due process of law. So far as the Declaration of Rights is concerned, it has been twice determined that a person who is in fact insane is not entitled to be discharged from a hospital on *habeas corpus*, provided the court is satisfied that the restraint and treatment there will be beneficial to him. In *re Oakes*, (1845) 8 Law Rep. 122; *Denny v. Tyler*, 3 Allen [Mass.] 225. In both of these cases the person was committed without any previous hearing, and without the order of the judge. It was held that the provision of the Declaration of Rights is not of universal application, and that it does not entitle an insane person to be set at liberty, if restraint is proper under the circumstances of the particular case. In the present case it must be assumed, from the petition, report, and argument, that the petitioner is in fact insane, and that the restraint and treatment of the hospital are beneficial to him. The case therefore falls directly within the decisions cited."

The following authorities support the rule announced in *Re Dowell*, *supra*: In *re Boyett*, 136 N. C. 415, 48 S. E. 791, 67 L. R. A. 972, 103 Am. St. Rep. 944, 1 Ann. Cas. 729; *King v. Coate*, Lofft, 73-76; *Brookshaw v. Hopkins*, Lofft, 240; In *re Shuttleworth*, 9 Q. B. 651; *Rex v. Gourlay*, 7 B. & C. 669; *Anderson v. Burrows*, 4 C. & P. 210; *Rex v. Turlington*, 2 Burr.

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1115; *Rex v. Clarke*, 3 Burr. 1362; *Scott v. Wakem*, 3 F. & F. 328; *Symm v. Fraser*, 3 F. & F. 859; *Hall v. Semple*, 3 F. & F. 337; *Fletcher v. Fletcher*, 1 Ell. & Ell. 420; *Ex parte Greenwood*, 24 L. J. Q. B. 148; *Look v. Dean*, 108 Mass. 116, 11 Am. Rep. 323; *Colby v. Jackson*, 12 N. H. 526; *Davis v. Merrill*, 47 N. H. 208.

For the purpose of committal for treatment in an asylum, it is not necessary that, in addition to insanity, there should be evidence of danger to the lunatic or others beyond what is implied in the insanity itself. The detention of the inmate, except under proceedings by virtue of valid statutes, can be justified only on the ground that it is for her care or that it would be dangerous for her to be at large. *Lott v. Sweet*, 33 Mich. 308; *Van Deusen v. Newcomer*, 40 Mich. 142.

In *People ex rel. Peabody v. Chanler, Sheriff, et al.*, 133 App. Div. 159, 117 N. Y. Supp. 322, proceedings by writ of *habeas corpus* by the people of the state on relation of A. Russell Peabody in behalf of Harry K. Thaw against Robert W. Chanler, sheriff of the county of Dutchess, was under consideration. At page 163 of 133 App. Div., at page 325 of 117 N. Y. Supp., it is said:

"In Dowdell's case, 169 Mass. 387, 47 N. E. 1033, 61 Am. St. Rep. 290, the petitioner applied for his discharge from commitment in that the statute was unconstitutional because it did not require any notice to the insane person before the commitment was signed, and so violated the provisions of the Declaration of Rights that no subject shall be deprived of his liberty but by the judgment of his peers and the law of the land, and the provisions of the fourteenth amendment to the Constitution of the United States that no state shall deprive any person of liberty without due process of law. And the court said: 'The order of commitment settles nothing finally or conclusively against the person committed. It does not take from him the care or control of his property. It is not equivalent to the appointment of a guardian over him. *Leggate v. Clark*, 111 Mass. 308, 310. He is entitled, as a matter of right, to institute judicial proceedings under the statutes to determine the necessity and propriety of his confinement. He is not denied the same protection of the laws which is enjoyed by all other persons in the commonwealth under like circumstances. He is not, therefore, deprived of his

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liberty without due process of law, according to the judicial construction which has been put upon those words. * * * And the right to institute judicial proceedings under the statutes is a sufficient protection of the liberty of the subject to meet the constitutional requirements. * * * ”

In *Sporza v. German Savings Bank*, 192 N. Y. 8, 84 N. E. 406, it is said :

“The proceedings thus provided for by the insanity law are in no wise designed as a substitute for those upon an inquisition *de lunatico inquirendo*. The purposes of the insanity law are protective merely, although an order for a commitment thereunder is described as ‘adjudging such person to be insane.’ The order is not, strictly speaking, a judgment at all, for it does not affect the status of the person alleged to be insane. This has been held in regard to a similar statute in Massachusetts, where it was said : ‘The order of commitment settled nothing finally or conclusively against the person committed. It does not take from him the care or control of his property. It is not equivalent to the appointment of a guardian for him. He is entitled, as a matter of right, to institute judicial proceedings under the statute to determine the necessity and propriety of his confinement under the statute.’ *Matter of Dowdell*, 169 Mass. 387, 47 N. E. 1033, 61 Am. St. Rep. 290.”

In *Ex parte Scudamore*, 55 Fla. 211, 46 South. 279, it is said :

“In the case of *Dowdell, Petitioner*, 169 Mass. 387, 47 N. E. 1033, 61 Am. St. Rep. 290, it is held that the right to institute judicial proceedings under the statute is a sufficient protection of the liberty of the subject to meet these constitutional requirements, even though no sort of notice to the lunatic was given in the initial proceeding by which he was so adjudged. * * * ”

The Dowdell case is cited also with approval in *Re Michael Gannon*, 16 R. I. 537, 18 Atl. 159, 5 L. R. A. 359, 27 Am. St. Rep. 759; *Ex parte Clark*, 86 Kan. 539, 121 Pac. 492; *In re Boyett*, *supra*.

In *Doyle, Petitioner*, 16 R. I. 537, 18 Atl. 159, 5 L. R. A. 359, 27 Am. St. Rep. 759, and *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 633, the statutes were declared void on the ground that they did not provide any mode of procedure whereby the person committed to an asylum could avail himself as of right, in his own behalf, for his discharge.

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In *Re Crosswell*, 28 R. I. 137, 66 Atl. 55, 13 Ann. Cas. 874, paragraph 3 of the syllabus is as follows:

"Such statute does not violate the provisions of the fourteenth amendment of the federal Constitution that no state shall deprive any person of life, liberty, or property without due process of law, or deny to any person the equal protection of the laws, since by statute the function of the writ of *habeas corpus* has been enlarged to apply to cases of commitments in insane hospitals, and it is made the duty of the court, upon application for such writ, 'to inquire and determine as to the sanity or insanity or the necessity of restraint of the person confined, at the time such application was made,' and to discharge the person confined if it appears, upon the verdict of a jury or in the opinion of the court, that such person is not insane or is not dangerous to himself or others, and ought not longer to be confined."

After the decision in the Doyle case the Legislature of Rhode Island amended the law so as to extend the remedy of the *habeas corpus* in case of insanity commitments, so as to have the insanity of the person determined in such proceeding, and thus the Crosswell case is clearly in point in sustaining the validity of the Oklahoma statute. In the United States it seems to be clear that the courts of equity, in the absence of statutory provisions investing them with a lunacy jurisdiction, derive such a jurisdiction from the commonwealth *ex necessitate* for the protection of the persons and property of the citizens. 22 Cyc. p. 1120. But generally the jurisdiction over insane persons and their estates is committed by statute either to the courts of equity as such, or to other courts exercising general probate jurisdiction. The only remedy in a court of law for the discharge of persons insane is a writ of *habeas corpus*. In *re Bresee*, 82 Iowa, 573, 48 N. W. 991; *Commonwealth v. Lecky*, 1 Watts (Pa.) 66, 26 Am. Dec. 37; *Ex parte Bedard*, 106 Mo. 617, 17 S. W. 693.

Assuming that sections 3701-3720, Comp. Laws 1909, are in force in this state, though the same did not require notice preliminary to a commitment to the asylum, the same would not be violative of the state or federal Constitution for the reason that section 3717 provides for a judicial hearing. Said section is as follows:

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"All persons confined as insane shall be entitled to the benefit of the writ of *habeas corpus*, and the question of insanity shall be decided at the hearing, and if the judge or court shall decide that the person is insane, such decision shall be no bar to the issuing of the writ the second time whenever it shall be alleged that such person has been restored to reason."

The right of trial by jury declared inviolate by section 19, art. 2, of the Constitution (section 27, Williams' Ann. Const. Okla.), as modified by the Constitution itself, means the right as it existed in the territory of Oklahoma at the time of the adoption of the Constitution. *State ex rel. West v. Cobb*, 24 Okla. 662, 104 Pac. 361, 24 L. R. A. (N. S.) 639. Such right does not appear to have existed under the territorial form of government. See, also, following authorities holding that a jury trial in such cases is not essential: *State v. Linderholm*, 84 Kan. 603, 114 Pac. 857; *In re Latta*, 43 Kan. 533, 23 Pac. 655; *Ex parte Clark*, 86 Kan. 539, 121 Pac. 493; *County of Black Hawk v. Springer*, 58 Iowa, 417, 10 N. W. 792; *Nobles v. Georgia*, 168 U. S. 398, 18 Sup. Ct. 87, 42 L. Ed. 515; *In re Boyett*, *supra*; *In re Dowdell*, *supra*; *In re Ferrier*, 103 Ill. 367, 43 Am. Rep. 10; *In re Bresee*, 82 Iowa, 573, 48 N. W. 991; *Fant v. Buchanan* (Miss.) 17 South. 371; *Ex parte Scudamore*, 55 Fla. 211, 46 South. 279; *In re Le Donne*, 173 Mass. 550, 54 N. E. 244; *De Hart v. Condit*, 51 N. J. Eq. 611, 28 Atl. 603, 40 Am. St. Rep. 545; *People v. Baker*, 59 Misc. Rep. 359, 110 N. Y. Supp. 848; *In re Brown*, 39 Wash. 160, 81 Pac. 552, 1 L. R. A. (N. S.) 540, 109 Am. St. Rep. 868, 4 Ann. Cas. 488; *State v. Snell*, 46 Wash. 327, 89 Pac. 931, 9 L. R. A. (N. S.) 1191.

Under the present status of the record, the writ will be quashed and Mrs. Dagley remanded to the custody of the superintendent of the asylum. If the relator desires to make an issue on the question of her insanity, this writ of *habeas corpus* will be made returnable before a district judge of the county in which she resided at the time of her commitment to the asylum for a hearing on said issue.

All the Justices concur.

PIERCE COAL CO. *et al.* v. WALKER.

No. 4028. Opinion Filed December 3, 1912.

(128 Pac. 493.)

APPEAL AND ERROR—Final Judgment—What Constitutes. An order made vacating a judgment for the purpose of permitting a party against whom said judgment is rendered to prosecute or defend is interlocutory and not a final order from which an appeal lies to the Supreme Court.

(Syllabus by the Court.)

*Error from District Court, Pittsburg County;
Preslie B. Cole, Judge.*

Action by W. M. Walker, a minor, by J. R. Walker, his next friend, against the Pierce Coal Company and another. Judgment for defendants, and from an order vacating the same they bring error. Dismissed.

J. E. Whitehead, for plaintiffs in error.

W. T. Williams, for defendant in error.

HAYES, J. Defendant in error brought this action against plaintiffs in error in the court below to recover damages for personal injuries alleged to have been received while in the employment of plaintiffs in error. Plaintiffs in error filed their answer, denying the allegations contained in defendant in error's petition. Thereafter the cause was set down for trial, and defendant in error did not appear, and the court, without hearing any evidence on behalf of defendant, entered judgment by default against defendant in error. Thereafter defendant in error filed his motion to set aside and vacate the judgment and to reinstate the action, which motion was supported by affidavit. The court thereafter sustained the motion of defendant in error to reinstate the cause and set aside the judgment theretofore rendered. From the order of the court, reinstating the cause and setting aside and vacating the judgment theretofore entered, this appeal is attempted to be prosecuted.

In re Ballot Title for Initiative Petition No. 43, State Question No. 28.

Defendant in error has moved to dismiss the appeal, for the reason, among others, that the order is not a final order from which an appeal lies to this court. The motion should be sustained, for it is well settled by the decisions of this court that an order made vacating a judgment for the purpose of permitting a party against whom said judgment is rendered to prosecute or defend is interlocutory, and not a final order from which an appeal lies to the Supreme Court. *Maddle v. Beavers*, 24 Okla. 703, 104 Pac. 909; *Aetna Bldg. & Loan Ass'n v. Williams et al.*, 26 Okla. 191, 108 Pac. 1100; *W. L. Moody & Co. v. Freeman-Sipes Co. et al.*, 29 Okla. 390, 118 Pac. 134; *Smith v. Whitlow et al.*, 31 Okla. 758, 123 Pac. 1061.

The appeal is, accordingly, dismissed.

All the Justices concur.

In re **BALLOT TITLE FOR INITIATIVE PETITION
NO. 43, STATE QUESTION NO. 28.**

No. 4061. Opinion Filed December 3, 1912.

(128 Pac. 681.)

APPEAL AND ERROR—Review—Abstract Questions. The Supreme Court will not decide abstract or hypothetical cases, disconnected from the granting of actual relief, or from the determination of which no practical relief can follow.

(Syllabus by the Court.)

Appeal from Ballot Title Filed by the Attorney General.

In the matter of preparing and filing a Ballot Title to State Question 28, Initiative Petition No. 43. From the action of the Attorney General, petitioner appeals. Dismissed.

Burford & Burford, for appellant.

Chas. West, Atty. Gen., and *Chas. L. Moore*, Asst. Atty. Gen., for appellee.

KANE, J. This is an appeal from the action of the Attorney General in the matter of preparing and filing a title to State

Abbott v. Rodgers.

Question No. 28, Initiative Petition No. 43, proposed for the purpose of repealing our present laws in relation to state, county, and precinct election boards, and in lieu thereof providing for state, county, and precinct election boards. It appears that the initiative petition has never been completed in the manner prescribed by law, in that it has never been filed with the Secretary of State with the requisite number of signers. The questions involved in the appeal have therefore become hypothetical. It has been often held by this court that:

“The Supreme Court will not decide abstract or hypothetical cases, disconnected from the granting of actual relief, or from the determination of which no practical relief can follow.” (*Edwards et al., Board of Trustees, v. Welch*, 29 Okla. 335, 116 Pac. 791; *Cleveland-Trinidad Paving Co. v. Woods*, 29 Okla. 684, 119 Pac. 123; *Bryan v. Sullivan*, 29 Okla. 686, 119 Pac. 124.)

The appeal is therefore dismissed.

All the Justices concur.

ABBOTT v. RODGERS.

No. 4064. Opinion Filed December 3, 1912.

(128 Pac. 908.)

APPEAL AND ERROR—Case-Made—Filing Below. The case-made attached to the petition in error, or a copy thereof, not having been filed with the papers in the case in the court below, the same is a nullity, and cannot be considered in this court, for the purpose of reviewing matters complained of in the trial court.

(Syllabus by the Court.)

Error from Dewey County Court;
Harry H. Smith, Judge.

Action between Emily Abbott and Clay Rodgers. From the judgment, Abbott brings error. Dismissed.

Baker & Bloss, for plaintiff in error.

Robt. E. Adams, for defendant in error.

Grant v. Creed et al.

WILLIAMS, J. Counsel for defendant in error moves to dismiss this proceeding in error for the reason that neither the case-made attached to the petition in error nor a copy thereof was filed with the papers in the case below. The said motion was filed in this court on November 13, 1912, showing service on attorneys for the plaintiff in error on the 11th day of November, 1912. No response has been made to said motion.

Under the authority of *St. Louis, I. M. & So. Ry. Co. v. Burrow*, 33 Okla. 701, 127 Pac. 478, the motion must be sustained.

See, also, *Marple v. Farmers' & Merchants' Nat. Bank*, 28 Okla. 810, 115 Pac. 1124; *Oligschalager v. Grell*, 13 Okla. 632, 75 Pac. 1131.

The motion to dismiss this proceeding in error must therefore be sustained.

All the Justices concur.

GRANT v. CREED et al.

No. 4149. Opinion Filed December 3, 1912.

(128 Pac. 511.)

TIME—Sundays—Exclusion—Appeal. The judgment sought to be reviewed was rendered on December 30, 1911; the motion for new trial being filed and overruled on the same day. The proceeding in error was commenced on July 1, 1912. The 30th day of June, 1912, fell on Sunday. The six months in which a proceeding for reviewing said judgment may be commenced in this court expired on that day, which must be excluded. The proceeding being commenced on July 1, 1912, was within time.

(Syllabus by the Court.)

Error from District Court, Osage County;
R. H. Hudson, Judge.

Action between Charles Grant and Martin L. Creed and others. From the judgment, Grant brings error. Motion to dismiss overruled.

S. H. King, for plaintiff in error.

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A. S. Sands and Burwell, Crockett & Johnson, for defendants in error.

WILLIAMS, J. The judgment sought to be reviewed in this proceeding was rendered in the court below on December 30, 1911. The motion for a new trial was also filed and overruled on the same day.

It was essential, in order to have said judgment reviewed in this court, that the proceeding should be commenced here within six months from the date of the final order or the rendition of the judgment. *Holcombe v. Lawyers' Co-Op. Pub. Co.*, *post*.

"The time within which an act is to be done shall be computed by excluding the first day, and including the last; if the last day be Sunday it shall be excluded." (Section 6258, Comp. Laws 1909; section 4629, St. Okla. 1893.)

See, also, *Boynton Land, Mining & Inv. Co. v. Runyan*, 29 Okla. 306, 116 Pac. 809; *Southern Pine Lumber Co. et al. v. Ward et al.*, 16 Okla. 131, 85 Pac. 459; *County of Smith v. Labore*, 37 Kan. 480, 15 Pac. 577.

In *County of Smith v. Labore*, *supra*, it is said:

"Now if we exclude the first day in the present case, to wit, April 28, 1885, which was the day on which the judgment was rendered, then the year within which the case is to be brought to this court would commence on April 29, 1885, and it would not end until the last moment of April 28, 1886; hence, under the Civil Code, it is clear that this case was brought to this court within proper time."

This case is controlling on this court. If we exclude December 30th, the date on which the judgment was rendered, the six months within which the case is to be brought by proceeding in error to this court would commence on December 31, 1911, and the six months expire with the last day of June, 1912, but the 30th day of June, 1912, was Sunday, which is to be excluded. This proceeding in error having been commenced on July 1, 1912, was in time.

The motion to dismiss is therefore overruled.

All the Justices concur.

In re Bridge Bonds, Ratliff Tp., Johnston County.

Ex parte LINKE.

No. 4165. Opinion Filed December 3, 1912.

(128 Pac. 702.)

DISCHARGE OF INSANE PERSONS. Same as that in *Ex parte Azillah Amanda Dagley*, ante, 128 Pac. 699.

(Syllabus by the Court.)

Application of W. H. Linke for a writ of *habeas corpus*.
Writ denied.

T. G. Chambers, for relator.

Cottingham & Bledsoe, for respondent.

WILLIAMS, J. The facts in this case are identical with those in *Ex parte Azillah Amanda Dagley*, ante, 128 Pac. 699, decided at this term, and the same order will be entered here as in that.

All the Justices concur.

In re BRIDGE BONDS, RATLIFF TP., JOHNSTON COUNTY.

No. 4188. Opinion Filed December 3, 1912.

(128 Pac. 681.)

1. **TOWNSHIPS—Bonds—Validity.** Section 1, c. 99 (Sess. Laws, 1910-11, p. 211), does not authorize a township through which a stream flows to issue bonds to bridge said stream at some point within the township, although such stream forms part of the boundary of the county in which such township lies.
2. **SAME.** Said statute authorizes the township to issue bonds for the construction of the bridge across a river or stream only when such river or stream forms the boundary of said township, and also the boundary of the county in which said township lies, and the bridge is to be constructed across the stream where it constitutes the common boundary of the township and county.

(Syllabus by the Court.)

Opinion of the Court.

*Error from District Court, Oklahoma County;
W. R. Taylor, Judge.*

In the matter of the bridge bonds of Ratliff Township, Johnston County. From a judgment holding the bonds invalid, the township brings error. Affirmed.

Cruce & Potter, for plaintiff in error.

Chas. West, Atty. Gen., for defendant in error.

HAYES, J. The judgment from which this appeal is prosecuted was rendered by the trial court upon an agreed statement of facts. The Washita river runs through Ratliff township, which is located in the western portion of Johnston county, in this state. Said river constitutes a portion of the boundary line between Johnston and Marshall counties, but does not form any portion of the boundary line of Ratliff township. The township officers have proceeded, under the provisions of chapter 99 of Sess. Laws 1910-11, to issue bonds for the construction of a bridge across said river in that township, and have submitted the bonds to the Attorney General as *ex-officio* bond commissioner of the state for his approval, which he refuses to do; and thereupon this agreed controversy was submitted to the trial court for a determination of the bond commissioner's duty in the premises.

The sole question presented is the construction of section 1 of said statute, which, in so far as it is material to this controversy, reads as follows:

"That the township board of any township of any county in the state of Oklahoma bordering on or lying adjacent to any river or stream which may be the boundary line between two counties, is hereby authorized and empowered to issue the bonds of such township for the purpose of building or assisting in the building, constructing, or assisting in constructing a bridge across such river or stream. * * *"

Subsequent sections of the statute prescribe in detail the procedure to be pursued in the issuing of such bonds, which can be done only after an election held at which the proposition must receive at least three-fifths of the votes of the electors voting thereon in order to authorize the issuance of such bonds. The

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contention of the municipal authorities is that the foregoing quoted provision of the statute authorizes the township board of any township through which a river runs that constitutes a boundary line between any two counties to issue bonds for the purpose of constructing a bridge over such river within such township. In other words, the test of the authority of a township board to construct a bridge over any river traversing the township is: Does such river form a boundary line between any two counties? The language of the statute is involved and its meaning ambiguous, and by a close analytical construction of the language used some justification may be found for the construction contended for by the municipal authorities; but this statute, we think, should be construed in connection with the already existing statutes on the subject of construction of bridges by township authorities. The act of which this statute forms a part, which was approved March 16, 1911, does not undertake to specifically repeal any existing statute, and should therefore be construed as supplementary legislation to the existing statutes upon the subject, except in so far as its provisions are clearly in conflict with the former statutes. Sections 7883 and 7884, Comp. Laws 1909, authorize the board of trustees of any township, with the approval of the board of county commissioners, to construct bridges across streams that run through any township. Section 7885 provides for the construction of bridges by townships on streams that constitute a boundary line between two townships in the same county. Section 7886 provides for the construction of bridges by two or more adjoining counties over any stream forming a boundary line between such counties or flowing from one county into the other; but, prior to the passage of the statute here involved, no authority existed in a township to construct or assist in constructing a bridge over a stream that constituted the boundary of townships in different counties and the common boundary of two counties. It can be easily understood how such authority in townships might become important in cases where two townships in different counties with a common boundary stream between find it, on account of the commercial relations of such townships, very necessary to the inhabitants of such town-

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ships that the stream between the townships be bridged. Without the provisions of the act under consideration, such bridge could be constructed only by the counties; but this act unquestionably authorizes such adjoining townships in different counties to join in the construction of the bridge across the boundary stream and empowers either township to construct same alone, and this, in our opinion, was all the authority intended by the legislators to be granted by the act. It is to be observed that the purpose for which the bonds may be issued is either to build or "assist in building," to construct, or "assist in constructing" a bridge across such river or stream. If the broad construction the township board contends for is to be given to this act, then any township may not only construct at some point within the township a bridge across any stream that flows through such township, if the stream forms the boundary between any two counties, but it may construct or assist in constructing a bridge at any point on said stream in the county, or out of the county of which the township forms a part; and, if the language be literally construed, it would not be necessary that the stream form a boundary of the county in which such township lies, but would be sufficient if it formed the common boundary of any two counties within the state. We think no such broad construction or meaning was intended by the Legislature. No reason upon which such legislation can be based can be conceived of. Much emphasis has been placed by counsel for the township upon the word "adjacent," as used in the statute, and they insist that by the use of this word it was intended to provide that it was unnecessary that the township border on or touch the river or stream which is to be bridged, and if such township lies reasonably near to the stream, so that its convenience will be served in bridging the stream, that it may participate in bridging the stream or bridge it at its own expense. As said by the court in *Wormley et al. v. Board of Supervisors*, 108 Iowa, 232, 78 N. W. 824:

"We realize that the word 'adjacent' does not at all times mean adjoining or abutting; but it is many times so used, and the purpose of its use is to be known from the context. Synonyms of the word are 'abutting,' 'adjoining,' 'attached,' 'beside,' 'bordering,' 'close,' 'contiguous,' 'neighboring,' 'next,' and 'nigh.'"

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In all statutes authorizing the issuance of bonds it is highly important that the authority of the municipality to issue same be definitely and clearly defined. If the use of the word "adjacent" in this statute be held to have the effect to authorize any township that is near such a stream, though not bounded by the stream, to issue bonds, the question will always arise in every case, how near such township must be, and at what distance from the stream the authority will cease to exist in the township. The result of such a statute would be that the authority of no township that was not bounded by the stream could be definitely known to the purchaser or vendors of the bonds until its power was determined by the courts. We do not think it was intended that this grant of authority should be made with such indefiniteness as to result in such uncertainty in the validity of all bonds that might be attempted to be issued under the statute; but that it was intended only to grant authority to a township bordering on a stream that forms the boundary of the county in which such township is located to construct across such stream a bridge leading from one county to the other, either at its own expense or assisted by the other townships bordering on said stream, and for such purpose it may issue bonds under the procedure prescribed by the statute.

The judgment of the trial court is accordingly affirmed.

TURNER, C. J., and WILLIAMS, J., concur; KANE and DUNN, JJ., absent, and not participating.

Dewalt v. Cline et al.

DEWALT v. CLINE *et al.*

No. 4220. Opinion Filed October 8, 1912.

Rehearing Denied December 3, 1912.

(128 Pac. 121.)

1. **GUARDIAN AND WARD—Sale of Minor's Land—Jurisdiction of County Court.** A county court, having acquired jurisdiction of the person and estate of a minor, may order the sale of the land of said minor lying and situated in another county of the state.
(a) Said court may also confirm said sale and order a guardian's deed to be made in obedience to the order of sale.
2. **APPEAL AND ERROR—Review—Findings of Court.** Where there is a conflict in the evidence on an issue, a finding thereon made by the lower court will not be disturbed on review in this court.

(Syllabus by the Court.)

Error from District Court, Mayes County;
Preston S. Davis, Judge.

Action between W. H. Dewalt and Silas A. Cline and others. From the judgment, Dewalt brings error. Reversed and remanded.

Robert F. Blair and Henry M. Brown, for plaintiff in error.

S. V. O'Hare, for defendants in error.

WILLIAMS, J. The questions essential to determine in this case are as follows:

(1) Has the county court of Wagoner county, it having acquired jurisdiction of the person and estate of a minor, authority and power to order the sale of certain land of said minor, the same being alienable and lying and being situated in Mayes county, Okla., and also authority and power to confirm said sale and order a guardian's deed made in obedience to said order of said court?

(2) As to the age of a certain allottee, as found by the trial court.

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1. Section 12 of article 7 of the Constitution provides:

"The county court, coextensive with the county, shall have original jurisdiction in all probate matters, and until otherwise provided by law, shall have concurrent jurisdiction with the district court in civil cases in any amount not exceeding one thousand dollars, exclusive of interest. * * *"

Section 13 of the same article provides:

"The county court shall have the general jurisdiction of a probate court. It shall probate wills, appoint guardians of minors, idiots, lunatics, persons *non compos mentis*, and common drunkards, grant letters testamentary and of administration, settle accounts of executors, administrators, and guardians; transact all business appertaining to the estates of deceased persons, minors, idiots, lunatics, persons *non compos mentis*, and common drunkards, including the sale, settlement, partition and distribution of the estates thereof."

Section 23 of the Schedule also provides:

"When this Constitution shall go into effect, the books, records, papers, and proceedings of the probate court in each county, and all causes and matters of administration and guardianship, and other matters pending therein, shall be transferred to the county court of such county, except of Day county, which shall be transferred to the county court of Ellis county, and the county courts of the respective counties shall proceed to final decree or judgment, order, or other termination in the said several matters and causes as the said probate court might have done if this Constitution had not been adopted. The district court of any county, the successor of the United States Court for the Indian Territory, in each of the counties formed in whole or in part of the Indian Territory, shall transfer to the county court of such county, all matters, proceedings, records, books, papers, and documents appertaining to all causes or proceedings relating to estates: Provided, that the Legislature may provide for the transfer of any of said matters and causes to another county than herein prescribed."

Section 5472 (section 1504, St. Okla. 1893) of Comp. Laws 1909 provides:

"The county court of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either, or both of them, of minors who have no guardian legally appointed by will, or deed, and who are inhabitants or

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residents of the county, or who reside without the state, and have estate within the county. * * *

Under the statutes existing at the time of the erection of the state, no sale of the estate of a minor or incompetent could be made except by the county court having jurisdiction to appoint a guardian for such minor or incompetent. The county court in acquiring jurisdiction of the estate or *rem* had jurisdiction coextensive with the state in the settlement of the estate of the decedent and the sale and distribution of his real estate, and excluded the jurisdiction of the county court of every other county. Sections 5144 and 5510, Comp. Laws 1909; sections 1178 and 1542, St. Okla. 1893; section 2 of the Schedule to the Constitution.

Section 23 of the Schedule, *supra*, contemplated that such pending probate proceedings should continue to final determination just as if there had been no change in the form of government. *Eaves v. Mullen*, 25 Okla. 679, 107 Pac. 433; *Davis v. Caruthers*, 22 Okla. 323, 97 Pac. 581.

Did the Constitutional Convention by sections 12 and 13 intend a change as to such probate proceedings arising subsequent to the erection of the state? When we construe sections 12 and 13 together, we conclude that no such intention was contemplated, but that the words, "the county court, coextensive with the county, shall have original jurisdiction in all probate matters," mean that such county court could acquire original jurisdiction only when a ground therefor existed within the boundaries of the county, and that section 13 means that, such county court having acquired jurisdiction over the estate of such minor, then it could exercise general probate jurisdiction over the same.

In *Lessee of Henry Avery v. John Pugh*, 9 Ohio, 67, it is said:

"The position assumed by the counsel for the plaintiff is that the court of common pleas, whether acting as a court of common law, of chancery, or of probate, is a court of limited local jurisdiction, and cannot take cognizance of matters without or beyond that local jurisdiction. This, to a certain extent, and as a general rule, is correct. It must exercise its jurisdiction within the appropriate county, but, when that jurisdiction has been

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exercised, the effects are not always limited to the county, or even to the state. A judgment recovered in one county, if the court had jurisdiction, is conclusive of the rights of the parties, not only in that particular county, but throughout the state and throughout the United States, and perhaps throughout the world.

"The court of common pleas is created by the Constitution, and its jurisdiction, in part, defined by that instrument; but it is left principally to subsequent legislation to ascertain the extent of its jurisdiction, as well as the manner in which that jurisdiction shall be exercised. The first section of the third article of the Constitution prescribes that 'judicial power of the state, both as to matter of law and equity, shall be vested in a Supreme Court, in courts of common pleas for each county, in justices of the peace, and in such other courts as the Legislature may, from time to time, establish.' The fifth section of the same article provides that 'the court of common pleas in each county, shall have jurisdiction of all probate and testamentary matters, granting administration, the appointment of guardians, and such other cases as shall be prescribed by law.' Acting under the Constitution, the General Assembly have, from time to time, passed laws regulating the practice of these courts, defining their duties and ascertaining their jurisdiction. In this legislation, however, the common-law, chancery, and probate jurisdiction has been described in different statutes. Each jurisdiction has been kept separate and distinct. To the Constitution, then, and to the laws conformable thereto, we must look in order to ascertain the extent of the jurisdiction of our several courts.

"As before remarked, the court of common pleas is a court of limited local jurisdiction. In other words, it must exercise its jurisdiction in its own appropriate county. But the law authorizes a change of venue, and by such change the jurisdiction is transferred to a tribunal having no original jurisdiction of the case, but which, by the change and the law under which it was made, acquires jurisdiction. And, notwithstanding the locality of the jurisdiction of the court of common pleas, still, when a judgment is once rendered by that tribunal, that judgment may be enforced by execution issued to any other county of the state. This is not because the jurisdiction of the court is coextensive with the state, but because the policy of the law requires that the property of a debtor, wherever located within the state, should be subjected to the payment of his debts. The same reason would operate in case of insolvent estates of deceased persons. The court of common pleas of the county in which the deceased had his last place of residence have not only jurisdiction to appoint,

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but it is their duty to appoint administrators on his estate. All the estate of the decedent is made assets for the payment of his debts; the personal estate first being appropriated. The real estate cannot be appropriated without an express order of the court after having ascertained the necessity of such appropriation. How does the court acquire the jurisdiction to make this order? Not from the fact that the land lies within the county, but from the fact that they appointed the administrator, and have a supervisory control over his actions until the estate is settled. And there certainly can be no more impropriety in permitting an order of sale to be executed in a distant county, than there is in permitting an execution issued upon a judgment of the same court sitting as a court of law to be enforced in a distant county."

In *Lessee of Marxson v. Sawyer*, 12 Ohio, 195, the court said:

"It is said by the plaintiff's counsel lastly that the court of common pleas of Ashtabula county had no jurisdiction over the subject-matter, so as to order the lands of the minor to be sold, which were situated in the county of Geauga. We entertain a different opinion. If this power do not exist, it is very certain that a minor's lands out of the county in which he resides could, under no circumstances, be put to sale. The guardian must be appointed in the county where he resides; and the statute provides that the court, appointing the guardian, may empower him to sell the land, etc. If he have no power to sell land in another county, the common pleas had no jurisdiction over the subject-matter, and all the proceedings are void. We should, however, hesitate to adopt that conclusion. The statute does not in terms certainly confine the sale to lands lying in the county; but provides that the guardian in making sales shall be governed by the same regulations as are required of administrators in the sale of real property; and in the case of the *Lessee of Avery v. Pugh*, 9 Ohio, 67, it was decided by this court that the common pleas of any county might direct an administrator to sell the real estate of the decedent in any other county. * * *

Such proceeding is an action *quasi in rem*. *Eaves v. Mullen*, 25 Okla. 702, 107 Pac. 433; *Scarf v. Aldrich*, 97 Cal. 360, 32 Pac. 324, 33 Am. St. Rep. 190; *Crawford v. McDonald*, 88 Tex. 626, 33 S. W. 325.

The reasoning of the foregoing cases sustains the authority of the county court of Wagoner county, it having acquired juris-

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diction of the estate of the minor, to order the sale of his real estate lying in another county for his support and maintenance or for reinvestment, etc.

In *Matthews v. Matthews et al.*, 104 Ala. 303, 16 South. 91, it is said:

"In *Turnipseed v. Fitzpatrick*, 75 Ala. 297, 301, the guardian and wards resided in Pike county, and the letters of guardianship had been issued by the probate court of that county. The wards' lands were situated in Bullock county. A petition was filed by the guardian in the probate court of Pike for an order to sell these lands in Bullock for division among the wards. The order was granted, and the lands were sold under it; but this court held the sale utterly void, for the want of jurisdiction in the probate court of Pike county to order it. This case is directly in point on the question we are considering. Upon it the court below sustained a demurrer to the petition of the guardian, and that ruling must be affirmed here unless we overrule *Turnipseed v. Fitzpatrick*. We think that case is unsound in the particular involved here, and will not follow it. The conclusion reached by the court in that case was upon analogies supposed to be furnished by the statute for the partition of lands among tenants in common or joint tenants, and by real action for the recovery of land. The sale in that case was for distribution to the wards. The sale sought in the case at bar is also for distribution to the wards in the sense of supporting and maintaining them. The administration of the estate in each instance was pending in the court which was invoked to make the order. It seems to us that a very much closer analogy exists between such cases as the one referred to and the case at bar on the one hand, and the sale of a decedent's lands on the application of the administrator for distribution on the other, than between partition proceedings and this. Indeed, the analogy we have suggested is perfect; and in respect of lands of an estate we have a statute which authorizes their sale when they cannot be equitably divided among the heirs or devisees 'by order of the probate court having jurisdiction of the estate.' Code, sec. 2105."

The syllabus of said cause is as follows:

"The probate court, having jurisdiction of the guardianship, has also jurisdiction to order the sale of land of the wards for their support and maintenance, wherever the land may be in the state."

Unless the minor is a nonresident of the state, only the county court of the county in which the minor resides or is an inhabi-

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tant of may appoint a guardian of his person and estate. Section 5472, Comp. Laws 1909, *supra*; *Connell v. Moore*, 70 Kan. 88, 78 Pac. 164, 109 Am. St. Rep. 408. That being true, it would follow that unless the county court of Wagoner county, having acquired jurisdiction of the person and estate of the ward in question, was authorized under a proper petition to order the sale of the real estate of said ward lying and situated in Mayes county, no provision of law exists in this state by which the realty of a minor lying and situated without the county of his residence may be sold for his support and maintenance or for the improvement of other real estate owned by him or for reinvestment. Since the erection of the state four (three regular and one extraordinary) sessions of the Legislature have been held. Evidently those legislative bodies have not so construed sections 12 and 13 of article 7 of the Constitution. This legislative construction, whilst not conclusive, is persuasive. *Betts v. Commissioners of Land Office*, 27 Okla. 64, 110 Pac. 766. It is also asserted without contradiction by plaintiff in error that since the erection of the state it has been the universal practice of the county courts, after acquiring jurisdiction over the person and estate of the ward, to fully administer such estate wherever it was situated within the state; that a great number of sales of lands of minors lying and situated within the state, without the county where the guardianship was pending, have been made and confirmed under this practice. A majority of this court also seem to have assumed that such power existed. In *Kirkpatrick v. Burgess*, 29 Okla. 121, 116 Pac. 764, it is said:

"Section 5472, Comp. Laws 1909, provides that 'the county court of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either, or both of them, of minors,' etc. Daniel W. Burgess was a minor, and that he should have a guardian in order that he may sell his lands is both convenient and necessary, and under these circumstances, in our judgment, if no guardian had been appointed, one could be, and, as one has already been appointed, there is no reason which we can see why he could not continue to act. The state agreed to the reservation made by Congress of the authority to fix the status of these people. We have a county court with full probate jurisdiction, with power to deal with the estates of

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minors. This defendant in error is a minor, whose marriage as to his land does not affect his status, and no good reason appears why we should not carry out the congressional intent and the courts accept the jurisdiction provided for in section 6, *supra* [Act May 27, 1908, c. 199, 35 St. at L. 313]. To accept the contention made by plaintiff in error would be to place this minor, after his marriage, in a situation wherein he could not sell his land, and neither could any guardian be appointed, or, if appointed, act in the sale of it, notwithstanding any necessity, thereby leaving a time in which the land would be absolutely inalienable—a condition contemplated by no one, and which is such an unreasonable situation that no court would accept it, except it was driven to it by provisions of law so plain and unambiguous as to leave no other course open.”

Many titles, representing numerous investments made under this practice, therefore depend for their validity upon the construction of sections 12 and 13 of article 7 of the Constitution. In *MaHarry v. Eatman*, 29 Okla. 46, 116 Pac. 935, one of the reasons given for holding that the probate courts prior to statehood had jurisdiction in certain instances to appoint guardians was that it had been the practice recognized for years in the Indian Territory, and that vast property interests had been acquired thereunder, and that such property rights would be unsettled by denying the authority of said courts to make such appointment. Chief Justice Marshall, in *McKeen v. Delancy's Lessee*, 5 Cranch, 22, 3 L. Ed. 25, is authority for this rule. We have also followed it in *Duff et al. v. Keaton*, 33 Okla. 92, 124 Pac. 291.

Further, it was well said by the Supreme Court of Alabama in *Matthews v. Matthews et al.*, *supra*:

“Such court can better judge as to the necessity for the proposed sale, and that is really the only inquiry, and the sale itself can be conducted by the guardian as well under the order of the one court as the other; and it is to such court that the guardian must make report of the sale since that court is charged with the duty of seeing to the proper administration and disposition of the proceeds of sale, and is therefore under a necessity to be thus apprised of the amount of such proceeds; and in all reason, the court having jurisdiction of the guardianship, and charged with the duty of conserving the interests of the wards, and having in its records and files much of the data necessary to intelligent action, should, and in our opinion does, have the power to

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confirm or set aside sales of the wards' lands, whether situated in one county or another."

We therefore hold that the county court of Wagoner county, having acquired jurisdiction of the person and estate of the ward in question, had authority to order the sale of the land of such ward lying and situated in Mayes county, to confirm the sale and order the guardian's deed to be made in obedience thereto.

2. At the time the sale of the land in question was confirmed, and the guardian's deed executed pursuant thereto, according to the rolls made by the Commissioners to the Five Civilized Tribes, the said ward was a minor. It is not essential in this case to determine as to the conclusiveness of the rolls, for the trial judge has found that at such time he was a minor. There being a conflict as to the evidence, even though the rolls were not conclusive evidence, this court would not disturb the finding of the trial court. But see *Yarbrough v. Spalding et al.*, 31 Okla. 806, 123 Pac. 843.

It follows that the judgment of the trial court is reversed and remanded, with instructions to proceed in accordance with this opinion.

All the Justices concur.

WATKINS et al. v. BARNWELL.

No. 4441. Opinion Filed December 3, 1912.

(128 Pac. 511.)

APPEAL AND ERROR—Dismissal—Summons. A petition in error filed in this court within the six months allowed by the statute, where neither waiver of issuance and service of summons in error is had, nor a praecipe for the same is filed, and summons issued thereon, nor general appearance made, within such statutory period, must on motion be dismissed.

(Syllabus, by the Court.)

Error from District Court, Seminole County;
Tom D. McKeown, Judge.

Watkins et al. v. Barnwell.

Action between Sylvester Watkins and others and J. M. Barnwell. From the judgment, Watkins and others bring error. Dismissed.

Crumph, Fowler & Skinner, for plaintiffs in error.

C. Dale Wolfe, for defendant in error.

WILLIAMS, J. On October 11, 1912, the plaintiffs in error filed their petition in error with case-made attached with the clerk of this court. According to the records of the clerk's office, plaintiffs in error have not filed any praecipe for the issuance of summons in error, neither has any waiver of the issuance of such summons nor any appearance in any way been made. The motion for a new trial was overruled on April 27, 1912. This proceeding in error should have been commenced within six months from that date. *Holcombe v. Lawyers' Co-Op. Pub. Co.*, *post*; *Grant v. Creed et al.*, *ante*, 128 Pac. 511.

A petition in error must be dismissed on motion, even though the same is filed in this court within the six months allowed under the statute, where no waiver of issuance and service of summons in error is had, and no praecipe for the same filed and summons issued thereon, or general appearance made within such statutory period. *Hudson v. Lapsley et al.*, 29 Okla. 681, 119 Pac. 125; *Simmons v. Lauffer*, 29 Okla. 132, 116 Pac. 943; *Hartsell v. Edwards et al.*, 29 Okla. 119, 116 Pac. 942; *Coleman v. Eaton*, 26 Okla. 858, 110 Pac. 672; *Chicago, R. I. & P. Ry. Co. v. Bradham*, 24 Okla. 250, 103 Pac. 591; *Court of Honor v. Wallace et al.*, 23 Okla. 734, 102 Pac. 111; *McMurtry v. Byrd et al.*, 23 Okla. 597, 101 Pac. 1117; *Clark v. Drake*, 33 Okla. 525, 126 Pac. 232.

The motion of the defendant in error for said proceeding in error to be dismissed must be sustained.

All the Justices concur.

Buchanan v. Loving et al.

BUCHANAN v. LOVING *et al.*

No. 4409. Opinion Filed December 3, 1912.

(128 Pac. 499.)

APPEAL AND ERROR—Petition in Error—Case-Made—Filing. Syllabus same as *Rolater v. Strain*, 31 Okla. 58, 119 Pac. 992.
(Syllabus by the Court.)

Error from District Court, Jackson County;
Frank Matthews, Judge.

Action between W. H. Buchanan and W. J. Loving and J. H. Loving. From the judgment, Buchanan brings error. Dismissed.

Tisinger, Clay, Robinson & Hamilton, for plaintiff in error.

E. E. Gore, for defendants in error.

KANE, J. This cause comes on to be heard upon a motion by the defendants in error to dismiss the appeal, upon the ground that the case-made and petition in error were not filed in the Supreme Court within six months after the judgment overruling the motion for a new trial in the district court was rendered. The record shows that the order overruling the motion for a new trial was entered on the 30th day of September, 1911, and that the case-made was filed in the Supreme Court on the 30th day of September, 1912. As the Session Laws of 1911, c. 18, p. 35, requiring appeals to be taken in six months, became effective on the 14th day of June, 1911, the petition in error and case-made should have been filed within six months after the date of the rendition of judgment overruling the motion for new trial. *Rolater v. Strain*, 31 Okla. 58, 119 Pac. 992.

The appeal is therefore dismissed.

All the Justices concur.

Park v. Merrill et al.

PARK v. MERRILL, *et al.*

No. 3864. Opinion Filed October 15, 1912.

Rehearing Denied December 3, 1912.

(128 Pac. 1131.)

*Error from District Court, Pottawatomie County;
Chas. B. Wilson, Jr., Judge.*

Action between Howard C. Park and M. F. Merrill and others. From the judgment, Park brings error. Dismissed.

W. S. Pendleton, for plaintiff in error.

Blakeney, Maxey & Miley, for defendants in error.

KANE, J. This cause comes on to be heard upon the motion of the defendants in error to dismiss the appeal, upon the ground, among others, that no summons in error has ever issued in said cause, and no attempt has been made to obtain service upon any of the defendants in error, though more than eighteen months have elapsed since the rendition of the judgment in said cause and overruling of the motion for new trial, and more than four months have transpired since the filing of said cause in the Supreme Court. It has many times been held by this court that this is a sufficient ground for dismissal. The motion to dismiss must be sustained.

TURNER, C. J., and WILLIAMS and DUNN, JJ., concur; HAYES, J., absent and not participating.

WESTERN UNION TELEGRAPH CO. v. STATE *et al.*

No. 2344. Opinion Filed December 3, 1912.

(128 Pac. 1132.)

Appeal from Corporation Commission.

Appeal by the Western Union Telegraph Company from an order of the Corporation Commission after hearing on complaint by G. T. Ralls, City Attorney of Coalgate. Cause remanded to the Commission.

Cottingham & Bledsoe, for appellant.

Chas. West, Atty. Gen., and *Chas. L. Moore* and *C. J. Davenport*, Asst. Attys. Gen., for appellees.

HAYES, J. This is an appeal from an order of the Corporation Commission, designated Order No. 285. The provisions of the order of which appellant complains require it to keep its office at Coalgate, in this state, open for receipt of commercial messages until ten o'clock p. m. each day, and to receive messages over the telephone at the request of the sender. The order was made after hearing upon complaint filed by appellee, G. T. Ralls. In the complaint it is alleged that appellant is engaged in the transportation of telegraphic messages between points within the state; that it renders service to the public at Coalgate, a town of about 5,000 inhabitants, a county seat, and the center of considerable coal mining business. Appellant maintains no separate office and operator at said place, but renders its service through the telegraphic operator of the Missouri, Kansas & Texas Railway Company, and said operator or company receives a commission on the business handled for appellant. The complaint alleges that the depot of the Missouri, Kansas & Texas Railway Company is inconveniently located to the business section of the town, and that the operator of the railway company is so engaged in the duties of the railway company that he does not and cannot discharge the duties of appellant to the public; that it is

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impossible for him to handle the business of appellant without great delay and inconvenience to its patrons. The prayer of the complaint asks that appellant be required to establish an office in the city, and to keep same open both day and night for receiving and transmitting business, and for such other and further order as the commission may deem necessary and just in the premises.

After notice to appellant and answer by it to the complaint, and after the hearing of the evidence thereon, the commission found that the facts would not justify an order requiring appellant to establish a separate office in the city, but by the order made the commission requires appellant to keep its present office open for receipt of commercial business until ten o'clock p. m. each night.

Although the complaint filed with the commission and the prayer thereto are comprehensive enough to authorize the order made by the commission, it appears that at the hearing before the commission both parties proceeded upon the theory that the only order sought was one requiring appellant to establish a separate office in Coalgate and to maintain in such office both night and day service. There is absence of any testimony whether the additional service required by the order appealed from can be rendered by appellant at its present office and what additional help, if any, will be required, and whether such service may be secured from the operator of the railway company. To appellant's motion for a new trial is attached an affidavit of appellant's assistant superintendent in charge of its lines in this state, in which he states that it will be impossible for appellant to comply with the order made by the commission under its arrangement with the railway company and its operator, for the reason that said operator is engaged in receiving and delivering orders pertaining to and affecting trains engaged in interstate commerce, and that the hours of labor of such operator are regulated by act of Congress; that the federal statute pertaining thereto prohibits such operator from remaining on duty for a longer period than nine hours in any 24-hour period in all offices continuously operated night and day, and prohibits him from remaining on duty

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for a longer period than thirteen hours in all offices operated only during the daytime. Act March 4, 1907, c. 2939, 34 St. at L. 1415, 1416 (U. S. Comp. St. Supp. 1911, p. 1321). He states that appellant has no control over the office of the railway company, and that to comply with this order will require the employment of an additional operator, which he cannot place in said office, and that therefore a compliance with the order will require it to establish a separate independent office, which the commission has found the evidence in this case does not justify. The evidence in the record does establish that the operator of the railway company through whom appellant performs its service is on duty from 7 o'clock a. m. to 7 o'clock p. m. each day; but the evidence does not establish whether his service pertains to or affects trains engaged in interstate commerce, nor is there any evidence, other than the affidavit attached to the motion for a new trial, whether it is possible for appellant to comply with this order under its arrangement with the railway company and its operator, without a violation by the operator and of the railway company of the federal act. Such information is necessary to this court before we can intelligently determine whether the order appealed from can be sustained; for it is plain that, if the service required by the order cannot be rendered by appellant with the use of the operator of the railway company without a violation of the federal act, the order compelling the service to be rendered in that manner cannot stand. But, on the other hand, if it can be shown that arrangements can be made by appellant with the railway company whereby its operator alone, or aided by other operators in the company's office, can render this service without violation of the federal act, then so far as the order is affected by this question it should be sustained.

Section 22, art 9, of the Constitution, authorizes this court, when it deems it necessary and in the interest of justice, to remand to the commission any case pending on appeal and require the same to be further investigated by the commission and reported upon to the court before the appeal is finally disposed of. It would be useless to affirm the order of the commission, if the result of such order is that its performance can be obtained only

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with a violation of the federal act; and since, under the showing made in this record, that question in all probability could and would be raised in any attempt to enforce the order, it should be determined in this proceeding.

It is therefore ordered that this cause be remanded to the commission, for the purpose of giving both parties an opportunity to introduce evidence touching the question above indicated, and for such other and further investigation by the commission as it may be able to make, to inform itself and this court upon that question and report thereon to this court within 30 days from this date.

TURNER, C. J., and WILLIAMS and KANE, JJ., concur;
DUNN, J., not participating.

SANDERS *et al.* v. HART.

No. 2310. Opinion Filed December 3, 1912.

APPEAL AND ERROR—Necessary Parties—Appearance—Jurisdiction.

All necessary parties to a proceeding in error must be brought into the appellate proceeding by summons in error or general appearance within the time allowed by statute for commencing such proceeding.

(a) When not so done, this court has no jurisdiction of said action.

(b) After the expiration of the time for commencing such proceeding, a necessary party having been omitted, jurisdiction cannot be conferred by the voluntary entering of the appearance of such necessary party.

(Syllabus by the Court.)

Error from Garvin County Court;
W. B. M. Mitchell, Judge.

Action by W. T. Hart against Joe Sanders and others. Judgment for plaintiff, and defendants bring error. Dismissed.

Patchell & Henderson and Geo. I. Jordan, for plaintiffs in error.

Blanton & Andrews, for defendant in error.

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WILLIAMS, J. The defendant in error, W. T. Hart, as plaintiff, sued the plaintiffs in error, Joe Sanders, Charley West, C. H. Blankenhisp, Will Ingram, and J. W. Weatherford, as defendants, in the county court of Garvin county. The cause was tried to a jury and a verdict rendered in favor of plaintiff against defendants on January 21, 1910. On January 24, 1910, a motion for a new trial was filed. The same was continued from time to time until July 1, 1910, when the same was overruled. On January 31, 1911, this proceeding was commenced in this court by filing a petition in error, with case-made attached. In due time defendant in error moved that this proceeding be dismissed on the ground that the judgment obtained was joint against all of said defendants, and that said defendant, J. W. Weatherford, had not been made a party hereto either as plaintiff or defendant in error.

On December 5, 1911, counsel for plaintiffs in error, in response to the motion to dismiss, stated:

"That the omission of the name of J. W. Weatherford as a party plaintiff in error was an accidental oversight in counsel for plaintiffs in error in writing the petition in error, and an unintentional omission. That said Weatherford is a party in interest, that he signed the supersedeas bond for this appeal and hereby enters his appearance as one of the plaintiffs in error in this cause and agrees to be bound by the decision of the court herein."

All necessary parties to a proceeding in error must be brought into the appellate proceedings, either by summons in error or general appearance, within the time allowed by statute for commencing such proceeding, and when not so done, this court has not jurisdiction of said action. *John v. Paullin et al.*, 24 Okla. 636, 104 Pac. 365; *Haynes et al. v. Smith*, 29 Okla. 703, 119 Pac. 246; *American National Bank v. Mergenthaler Linotype Co.*, 31 Okla. 533, 122 Pac. 507.

The appeal must be dismissed.

All the Justices concur.

Chicago, R. I. & P. Ry. Co. et al. v. State.

CHICAGO, R. I. & P. RY. CO. *et al.* v. STATE.

No. 3472. Opinion Filed December 5, 1912.

(128 Pac. 900.)

CARRIERS—Rates—Regulation—Corporation Commission's Order. An appeal having been prosecuted from an order of the Corporation Commission promulgating rates, rules, and regulations, and the commission having filed in this court its recommendations as to the modification of said order, and the appellants and appellee appearing and agreeing to submit said appeal on the record and said recommendation, and waiving the filing of briefs, it not being pointed out by specification of error wherein such order so modified would be unreasonable and unjust, held, that the recommendation of the commission will be adopted, and that said order will be affirmed as modified under said recommendation.

(Syllabus by the Court.)

Appeal from State Corporation Commission.

Proceeding by the State for the adoption and promulgation of certain grain rates, from which the Chicago, Rock Island & Pacific Railway Company and others appeal. Affirmed, as modified.

C. O. Blake, Cottingham & Bledsoe, R. A. Kleinschmidt, C. L. Jackson, E. A. De Meules, E. R. Jones, Geo. E. Black, L. P. Miles, and Chas. E. Warner, for appellants.

Chas. West, Atty. Gen., and Chas. L. Moore, Asst. Atty. Gen., for the State.

WILLIAMS, J. The Corporation Commission of the state of Oklahoma has filed, in writing, certain recommendations for modification by this court as to order No. 503, involved in this appeal. All the attorneys for the appellants, and the Attorney General, for the state, appeared in open court and by agreement submitted the case upon the record in this appeal and said recommendations of the commission and waived the filing of briefs.

It is ordered that the commission's recommendations be adopted, and in lieu of the rates, rules, and regulations contained

Opinion of the Court.

in the original Order No. 503, that the rates, rules, and regulations contained in said recommendations, which are as follows:

CORPORATION COMMISSION OF OKLAHOMA.

Cause No. 1,350.

Order No. 503.

To the Atchison, Topeka & Santa Fe Railway Company, Chicago, Rock Island & Pacific Railway Company, Clinton & Oklahoma Western Railway Company, Ft. Smith & Western Railroad Company, Gulf, Colorado & Santa Fe Railway Company, Kansas City, Mexico & Orient Railway Company, Kansas City Southern Railway Company, Midland Valley Railroad Company, Missouri, Kansas & Texas Railway Company, Missouri, Oklahoma & Gulf Railway Company, Oklahoma Central Railway Company, St. Louis & San Francisco Railroad Company, St. Louis, El Reno & Western Railway Company, St. Louis, Iron Mountain & Southern Railway Company, and Wichita Falls & Northwestern Railway Company:

It is hereby ordered that on and after the 24th day of July, 1911, the railroads and railways named above shall not assess or collect a greater rate for the shipment, in carload lots, of the commodities named herein between points on their lines in this state than provided herein, and that, in so far as they are applicable, the rules and regulations named herein shall govern the handling and assessment of charges upon such commodities between points in the state of Oklahoma, and otherwise to be governed by rules heretofore or hereafter issued by this commission.

Item No. 1.

| Miles | Col- umn 1. | Col- umn 2. | Col- umn 3. | Miles | Col- umn 1. | Col- umn 2. | Col- umn 3. |
|-------|-------------------|-------------------|-------------------|-------|-------------------|-------------------|-------------------|
| 5 | 4.5 | 3.5 | 4. | 120 | 10. | 8. | 10. |
| 10 | 4.5 | 3.5 | 4.3 | 125 | 10. | 8. | 10.4 |
| 15 | 4.5 | 4. | 4.6 | 130 | 10.5 | 8.5 | 10.4 |
| 20 | 5. | 4.5 | 4.9 | 135 | 10.5 | 9. | 10.8 |
| 25 | 5. | 4.5 | 5.2 | 140 | 11.5 | 10. | 10.8 |
| 30 | 5.5 | 5. | 5.5 | 145 | 11.5 | 10. | 11.2 |
| 35 | 6. | 5. | 5.8 | 150 | 12. | 10. | 11.2 |
| 40 | 6.5 | 5.5 | 6.1 | 155 | 12. | 10. | 11.6 |
| 45 | 6.5 | 5.5 | 6.4 | 160 | 12.5 | 10.5 | 11.6 |
| 50 | 7. | 5.5 | 6.7 | 165 | 12.5 | 10.5 | 12. |
| 55 | 7. | 6. | 7. | 170 | 12.5 | 11. | 12. |
| 60 | 7. | 6. | 7.3 | 175 | 12.5 | 11. | 12.4 |
| 65 | 7. | 6. | 7.6 | 180 | 12.5 | 11. | 12.4 |
| 70 | 7. | 6.5 | 7.9 | 185 | 12.5 | 11. | 12.8 |
| 75 | 7. | 6.5 | 8.2 | 190 | 13. | 11.5 | 12.8 |
| 80 | 8. | 7. | 8.4 | 195 | 13. | 11.5 | 13.2 |
| 85 | 8. | 7. | 8.6 | 200 | 13. | 11.5 | 13.2 |
| 90 | 8.5 | 7. | 8.8 | 210 | 13. | 11.5 | 13.5 |
| 95 | 8.5 | 7. | 9. | 220 | 13. | 11.5 | 13.8 |
| 100 | 9. | 7. | 9.2 | 230 | 13.5 | 11.5 | 14.1 |
| 105 | 9. | 7. | 9.6 | 240 | 13.5 | 11.5 | 14.4 |
| 110 | 9.5 | 7.5 | 9.6 | 250 | 13.5 | 12. | 14.7 |
| 115 | 9.5 | 7.5 | 10. | 260 | 13.5 | 12. | 15. |

Chicago, R. I. & P. Ry. Co. et al. v. State.

| Miles | Col- umn 1. | Col- umn 2. | Col- umn 3. | Miles | Col- umn 1 | Col- umn 2. | Col- umn 3. |
|-------|-------------------|-------------------|-------------------|-------|------------------|-------------------|-------------------|
| 270 | 13.5 | 12. | 15.3 | 350 | 15. | 13.5 | 17.1 |
| 280 | 13.5 | 12. | 15.6 | 360 | 15.5 | 13.5 | 17.3 |
| 290 | 14. | 12. | 15.8 | 370 | 15.5 | 14. | 17.5 |
| 300 | 14. | 12.5 | 16.1 | 380 | 15.5 | 14. | 17.7 |
| 310 | 14. | 12.5 | 16.3 | 390 | 16. | 14. | 17.9 |
| 320 | 14.5 | 12.5 | 16.5 | Over | | | |
| 330 | 14.5 | 12.5 | 16.7 | 390 | 16. | 14.5 | 18. |
| 340 | 15. | 13. | 16.9 | | | | |

When exact distance is not shown use next greater distance.

Item No. 2.

Rates named in column 1 of item 1 apply on shipments of buckwheat, buckwheat flour, cracked wheat, cerealine (except brewers'), crushed wheat, farina, farinose, pancake flour, pearl barley, prepared flour, rolled wheat, rye flour, wheat, wheat chops, wheat flour and chicken feed made of grain and seed only.

Item No. 3.

Rates named in column 2 of item 1 apply on alfalfa meal, alfalfa feed mixtures, barley, bran, brewers' cerealine, brewers' grits, brewers' meal, brewers' malt, brewers' grist, chopped feed (other than wheat chop), corn, corn flour, corn germ, corn germ meal, corn meal, gluten feed, gluten meal, grain screenings, grits, hominy, hominy feed, gluten meal, Kafir corn, maize, middlings, oats, oat dust, oat flake, oat groats, oat hulls, oat meal, rolled oats, rolled rye, rye, shorts and speltz.

Item No. 4.

Rates named in column 3 of item 1 apply on hay (prairie, timothy or alfalfa), straw and corn husks.

Item No. 5.

Rates on the following commodities will be made by adding three (3) cents per one hundred pounds to the rates named in column 1 of item 1; Broom corn, seed, castor beans, flax seed, hemp seed, Hungarian seed, millet seed, pop corn, alfalfa seed, linseed cake, linseed meal and sorghum seed.

Item No. 6.

The rates named in column 1 to 3, inclusive, of item 1 are for application on shipments moving via one line or via two or more lines which are directly or indirectly under the same management and control. for shipments moving via more than one line not under the same management and control add the following arbitraries:

2 lines.

3 lines.

Commodities named in item 2 2½

Use two line rate plus local for each additional line.

Commodities named in item 3 2

Commodities named in item 4 3

Commodities named in item 5 4

—observing combination of local rates as maximum.

Note.—Where switching service is necessary at a stopping or transit point, switching charges shall be assessed as per Order 440 and such service shall not be considered as forming a two-line haul.

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Item No. 7.

Minimum weights on commodities mentioned herein shall be as follows:

- (a) Hay, straw or shucks, cars to be loaded to actual visible loading capacity, minimum weight of 17,000 pounds to be assessed.
- (b) Grain products and mixtures named in (a), item 9, 24,000 lbs.
- (c) Commodities named in item 5, oats, barley, alfalfa meal, alfalfa feed mixtures and Kaffir corn, 30,000 pounds.
- (d) Wheat, rye and corn marked capacity of car.

Provided, when cars are loaded to actual visible loading capacity or to marked load limit, actual weight, but not less than 30,000 pounds, shall govern.

Item No. 8.

Cars must not be loaded in excess of ten per cent. of their marked capacity and if cars are loaded in excess of this limit, carriers may transfer overload to a second car, the minimum weight to be applied on the entire shipment to be the marked capacity of the car in which shipment was originally loaded and for such transfer service the carriers may assess the actual cost plus ten per cent., which shall follow as charges against the shipment.

Item No. 9.

Commodities mentioned in this order may be shipped in mixed carloads subject to the following provisions:

- (a) Grain, grain products and seeds, all or all but one of the commodities to be in sacks or packages, subject to carload rates applicable to each commodity contained in the car on the actual weight of such commodity, provided, that when such cars do not contain the minimum the deficiency shall be charged for at the rate applying on the commodity taking the lowest rate.

Provided, that not more than 33⅓% of the weight shall be grain, and if in excess of this amount of grain is shipped in such mixed car, charge shall be made for the grain products at the minimum car weight and the grain shall be charged for at the actual carload rate at actual weight.

- (b) Coarse grains consisting of barley, corn, Kaffir corn, oats, rye and wheat may be shipped in mixed carloads, sacked or in bulk, at the highest rate and minimum weight applicable on any commodity contained in the car.

Provided, if shipped in bulk, bulk heads or partitions shall be provided by or at the expense of the shipper and such shipments shall be at the owner's risk of mixing.

Item No. 10.

Commodities mentioned in items 2 to 5, inclusive, may be stopped in transit as per the conditions hereafter mentioned and reforwarded at the through rates applicable from point of origin to final destination, provided such shipments are tendered at such stopping point within one year from the date they were received at such stopping or milling points.

Rule No. 1.

- (a) One stop in transit shall be allowed at a point on the line of the carrier originating the shipment or the next connecting carrier for

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the purpose of inspection, weighing, cleaning, clipping, shelling, sacking, mixing, grading and storing.

(b) In addition to the privilege granted in (a) one stop may be allowed for the privilege of milling.

Note:—See Rule No. 6 relative to reconsigning.

Rule No. 2.

A daily record shall be kept by operators of elevators, mills, etc., of all articles entitled to the privilege shown above unloaded into and out of such elevators, mills, etc., and such record shall include in and out bound tonnage received by rail, water, wagon or other means.

Rule No. 3.

The record of such tonnage as maintained by such elevators, etc., shall be in such manner as to permit a check of same and the carriers mentioned above, either separately or jointly shall have the authority to appoint inspectors who shall be permitted to check such statements at such times during reasonable business hours as they deem necessary, and it shall be the duty of such inspectors when making such checks to cancel all billing in excess of tonnage in such elevator, etc., at the time such check is made and in making such cancellations they shall cancel the oldest unexpired billing first proportionately between the different lines interested.

Rule No. 4.

Where a transit point is located at the junction of carriers, billing shall be interchanged by such carriers as though shipment was moving through, but an outbound shipment from such a junction point cannot be composed of shipments received at such junction point via the lines of more than one carrier. Where a shipment arrives via the line of one road and after receiving transit privileges is forwarded via the line of another carrier from such junction, the agent of the line bringing the shipment to such transit point shall certify to the agent of the forwarding carrier, a copy of the whole or such part of the inbound bill as may be requested by the shipper, and the forwarding carrier shall then issue new bill of lading treating the shipment as though it was billed through from the original point of origin.

Rule No. 5.

Where a shipment from transit point, either a junction or local, is not sufficient to make up the required minimum carload weight, sufficient tonnage may be added to maintain such minimum and the flat carload rate transit point to final destination shall be applied on such additional tonnage.

Rule No. 6.

Transit privileges provided herein shall be permitted whether shipments move from original point of origin to transit point and then either in a forward direction or in the direction of, to or beyond the point of origin and the rate shall be assessed by figuring the mileage from actual point of origin to final destination.

Provided, that where the combination on the shipment before and after transit privilege exceeds 350 miles that in addition to the regular mileage rate five mills per ton per mile shall be added for each mile in excess of 350 miles if the shipment has not moved from original point of origin to final destination on a direct haul in one direction.

Opinion of the Court.

Note.—Reconsigning rules mentioned in this Commission's Order No. 170 shall govern this order with the exception of an additional charge on hauls over 350 miles in lieu of 450 miles as stated in Order No. 170 and such reconsigning, where cars are not opened at reconsigning points, shall not be considered as being granted privileges mentioned in (a) and (b) of rule 1.

Rule No. 7.

When shipments are tendered to carriers at transit points shippers shall also present to the agent expense bills covering in-bound tonnage in order to secure advantages of the transit rate and out-bound shipments may be composed of parts of one or more cars of in-bound shipments where all of such in-bound shipments came to transit via the line of the one carrier.

Rule No. 8.

Transfer of tonnage is permissible, but the same must be by formal assignment or order and not by indorsement in blank. The freight bills must be representative of the property. Tonnage may be transferred from one elevator, etc., to another elevator, etc., and the freight bills therefor must show such transfer. The records must always be so maintained so that the actual movement of the grain may be traced.

Rule No. 9.

Shipments must be made from transit points within twelve months as per paid freight bill from the time received at transit stations. If held longer than twelve months the freight bills will be canceled and no transit privilege permitted on same.

Rule No. 10.

When cars contain mixed lots the forwarding agent at milling station must take up freight bills representative of each kind of article loaded in order to apply transit rate on such shipments.

Rule No. 11.

Where shipments reach transit point via a line not having trackage connection with the elevator, etc., to which shipment is consigned and it is necessary to switch same via another line, regular switching charges shall be assessed for such movement and the movement via such line or lines shall not be considered as causing a two or more line haul.

Rule No. 12.

When corn in the shuck or on the cob is shipped into the transit point for shelling or milling, transit privilege shall be permitted on but 80% of the in-bound weight, the 20% being allowed as the weight of the cobs and shucks, and in reckoning the charges the in-bound charges shall be reduced ten (10) per cent.

Example: 30,000 pounds in-bound—permit transit privilege on 24,000 pounds and assess charges on 27,000 pounds in-bound.

Rule No. 13.

Where transit privileges are accorded shipments of feed or other mixtures of grain and grain product with or without alfalfa in-bound expense bills surrendered, must be representative of the actual out-bound shipment in exact percentage proportion, and the shipper must

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so certify to the agent at transit station by signed declaration on the back of expense bills, indicating the percentage of the constituent parts of the out-bound mixture.

For illustration. If an out-bound shipment aggregating 60,000 pounds contain 60% corn and 40% alfalfa in-bound expense bills must be surrendered for 36,000 pounds of corn and 24,000 pounds of alfalfa.

Item No. 11.

The railways and railroads named herein shall prepare and publish joint tariffs to carry out the provisions of this order and such tariffs shall be filed with each agent and two copies for the account of each carrier named herein shall be filed in the office of this commission.

The commission reserves the right to direct the basis for revenue divisions wherever carriers fail to agree.

Item No. 12.

All orders or parts of orders heretofore issued by this commission which in any way conflict with the rules named herein are hereby canceled and superseded, the commission reserving the right to relieve the carriers, consignors or consignees of any hardships caused by the enforcement of the rules and regulations named herein either before or after movement.

—be and are hereby made effective as of the date of said original order, to wit, the 24th day of July, A. D. 1912. Tariff under this order to become effective as to the various lines when the schedule of rates is printed and filed with the commission.

All the Justices concur.

CHICAGO, R. I. & P. RY. CO. *et al.* v. STATE.

No. 3557. Opinion Filed December 5, 1912.

(128 Pac. 903.)

CARRIERS — Rates — Regulation—Corporation Commission. An appeal having been prosecuted from an order of the Corporation Commission promulgating rates, rules, and regulations, and the commission having filed in this court its recommendations as to the modification of said order, and the appellants and appellee appearing and agreeing to submit said appeal on the record and said recommendations, and waiving the filing of briefs, it not being pointed out by specification of error wherein such order so modified would be unreasonable and unjust, held, that the recommendations of the commission will be adopted, and that said order will be affirmed as modified under said recommendations.

(Syllabus by the Court.)

Opinion of the Court.

Appeal from State Corporation Commission.

Proceeding by the State for the adoption and promulgation of certain freight rates on oil, from which order the Chicago, Rock Island & Pacific Railway Company and others appeal. Affirmed as modified.

C. O. Blake, Cottingham & Bledsoe, R. A. Kleinschmidt, C. L. Jackson, E. A. De Meules, E. R. Jones, Geo. E. Black, L. P. Miles, and Chas. E. Warner, for appellants.

Chas. West, Atty. Gen., and Chas. L. Moore, Asst. Atty. Gen., for the State.

WILLIAMS, J. The Corporation Commission of the state of Oklahoma has filed, in writing, certain recommendations for modification by this court as to order No. 509 involved in this appeal. All the attorneys for the appellants, and the Attorney General, for the state, appeared in open court and by agreement submitted the case upon the record in this appeal and the recommendations of the commission and waived the filing of briefs.

It is ordered that the commission's recommendations be adopted, and in lieu of the rates, rules, and regulations contained in the original order No. 509, that the rates, rules, and regulations contained in said recommendations, which are as follows, to wit:

CORPORATION COMMISSION OF OKLAHOMA.

Cause No. 1,394.

Order No. 509.

To the Atchison, Topeka & Santa Fe Railway Company, Chicago, Rock Island & Pacific Railway Company, Clinton & Oklahoma Western Railway Company, Ft. Smith & Western Railroad Company, Gulf, Colorado & Santa Fe Railway Company, Kansas City, Mexico & Orient Railway Company, Kansas City Southern Railway Company, Midland Valley Railroad Company, Missouri, Kansas & Texas Railway Company, Missouri, Oklahoma & Gulf Railway Company, Oklahoma Central Railway Company, St. Louis & San Francisco Railroad Company, St. Louis, El Reno & Western Railway Company, St. Louis, Iron Mountain & Southern Railway Company, and Wichita Falls & Northwestern Railway Company:

It is hereby ordered that on and after the 31st day of August, 1911, no railroad or combination of railroads doing business in the state

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of Oklahoma shall charge, assess or collect a greater rate for the shipment of the commodities named herein in carload lots than are herein provided, and that the following rules, in so far as they are applicable, shall govern the handling and assessment of charges upon such commodities between points in the state of Oklahoma on the lines of the railroads and railways named above:

Item No. 1.

Rates in cents per 100 pounds.

| Miles | Col- umn 1. | Col- umn 2. | Miles | Col- umn 1. | Col- umn 2. |
|-------|----------------|----------------|-------|----------------|----------------|
| 5 | 4.0 | 5.0 | 210 | 10.2 | 17.9 |
| 10 | 4.0 | 5.5 | 220 | 10.4 | 18.3 |
| 15 | 4.2 | 6.0 | 230 | 10.6 | 18.7 |
| 20 | 4.5 | 6.5 | 240 | 10.8 | 19.1 |
| 25 | 4.8 | 7.0 | 250 | 11.0 | 19.5 |
| 30 | 5.1 | 7.4 | 260 | 11.2 | 19.9 |
| 35 | 5.4 | 7.8 | 270 | 11.4 | 20.3 |
| 40 | 5.6 | 8.2 | 280 | 11.6 | 20.7 |
| 45 | 5.8 | 8.6 | 290 | 11.8 | 21.1 |
| 50 | 6.0 | 9.0 | 300 | 12.0 | 21.5 |
| 55 | 6.2 | 9.4 | 310 | 12.1 | 21.8 |
| 60 | 6.4 | 9.8 | 320 | 12.2 | 22.1 |
| 65 | 6.6 | 10.2 | 330 | 12.4 | 22.4 |
| 70 | 6.8 | 10.6 | 340 | 12.5 | 22.7 |
| 75 | 7.0 | 11.0 | 350 | 12.6 | 23.0 |
| 80 | 7.2 | 11.3 | 360 | 12.7 | 23.3 |
| 85 | 7.4 | 11.6 | 370 | 12.8 | 23.6 |
| 90 | 7.6 | 11.9 | 380 | 12.9 | 23.9 |
| 95 | 7.8 | 12.3 | 390 | 13.0 | 24.2 |
| 100 | 8.0 | 12.5 | 400 | 13.1 | 24.5 |
| 110 | 8.2 | 13.0 | 410 | 13.2 | 24.7 |
| 120 | 8.4 | 13.5 | 420 | 13.3 | 24.9 |
| 130 | 8.6 | 14.0 | 430 | 13.4 | 25.1 |
| 140 | 8.8 | 14.5 | 440 | 13.5 | 25.3 |
| 150 | 9.0 | 15.0 | 450 | 13.6 | 25.5 |
| 160 | 9.2 | 15.5 | 460 | 13.7 | 25.7 |
| 170 | 9.4 | 16.0 | 470 | 13.8 | 25.9 |
| 180 | 9.6 | 16.5 | 480 | 13.9 | 26.1 |
| 190 | 9.8 | 17.0 | 490 | 14.0 | 26.3 |
| 200 | 10.0 | 17.5 | 500 | 14.1 | 26.5 |

Item No. 2.

Rates named in column 1 of item 1 will apply on shipments of crude petroleum, residuum and oils used exclusively for fuel purposes.

Item No. 3.

Rates named in column 2 of item No. 1 will apply on shipments of "petroleum and petroleum products" as described in "Western Classification No. 50," or approved Supplements thereto or reissues thereof, where same do not conflict with rules named herein.

Item No. 4.

Rates named in item No. 1 are for application over one line of road, or via two or more lines directly or indirectly under the same

Opinion of the Court.

management and control. For rates via two lines not directly or indirectly under the same management and control add two cents to figures shown in column 1 and four cents to figures shown in column 2. Via three lines not directly or indirectly under the same management and control, add three cents to figures shown in column 1 and six cents to figures shown in column 2, observing combination of local rates as maximum.

Item No. 5.

Minimum weights on shipments named herein will be, when in tank cars, the marked gallonage capacity of the car used, basing commodities named in item No. 2 at 7.4 pounds per gallon and commodities named in item No. 3 at 6.6 pounds per gallon.

When loaded in other than tank cars the minimum weight shall be 26,000 pounds.

Item No. 6.

Mixed carload shipments of commodities named in items 2 and 3 may be made at the highest rate and minimum weight applicable upon any commodity contained in the car.

Item No. 7.

Where shipments are reconsigned either before or after reaching the first destination and such reconsignment causes a movement of over three hundred miles from point of origin to final destination, one mill shall be added to figures shown in column 1, and two mills to figures shown in column 2 for each ten miles, or fraction thereof, shipment moves in excess of three hundred miles.

Item No. 8.

The railways and railroads named herein shall prepare and publish joint tariff to carry out the provisions of this order. One copy of such tariff shall be filed at each freight depot of each and all of the carriers named herein and two copies for account of each carrier named herein shall be filed with this commission.

The commission reserves the right to direct the basis for revenue divisions wherever carriers fail to agree.

Item No. 9.

All orders or parts of orders heretofore issued by this commission which in any way conflict with the rules named herein are hereby canceled and superseded, the commission reserving the right to relieve the carriers, consignors or consignees of any hardships caused by the enforcement of the rules named herein either before or after movement.

—be and are hereby made effective as of the date of said original order, to wit, 31st of August, A. D. 1911. This tariff to become operative as to the various lines when the schedule of rates is printed and filed with the commission.

All the Justices concur.

Chicago, R. I. & P. Ry. Co. et al. v. State.

CHICAGO, R. I. & P. RY. CO. *et al.* v. STATE.

No. 3674. Opinion Filed December 5, 1912.

(128 Pac. 904.)

CARRIERS—Rates—Regulation—Corporation Commission. An appeal having been prosecuted from an order of the Corporation Commission promulgating rates, rules, and regulations, and the commission having filed in this court its recommendations as to the modification of said order, and the appellants and appellee appearing and agreeing to submit said appeal on the record and said recommendations, and waiving the filing of briefs, it not being pointed out by specification of error wherein such order so modified would be unreasonable and unjust, held that the recommendation of the commission will be adopted, and that said order will be affirmed as modified under said recommendation.

(Syllabus by the Court.)

Appeal from State Corporation Commission.

Proceeding by the State Corporation Commission for the establishment and promulgation of railroad rates on agricultural implements. From an order fixing a schedule of rates, the Chicago, Rock Island & Pacific Railway Company and others appeal. Rates modified, and order affirmed.

C. O. Blake, Cottingham & Bledsoe, R. A. Kleinschmidt, C. L. Jackson, E. A. De Meules, E. R. Jones, Geo. E. Black, L. P. Miles, and Chas. E. Warner, for appellants.

Chas. West, Atty. Gen., and Chas. L. Moore, Asst. Atty. Gen., for the State.

WILLIAMS, J. The Corporation Commission of the state of Oklahoma has filed, in writing, certain recommendations for modification by the court as to order No. 516 involved in this appeal. All the attorneys for appellants, and the Attorney General, for the state, appeared and in open court by agreement submitted the case upon the record in this appeal and said recommendations of the commission, and waived the filing of briefs.

It is ordered that the commission's recommendations be adopted, and in lieu of the rates, rules, and regulations contained

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in the original Order No. 516, that the rates, rules, and regulations contained in said recommendations, which are as follows:

CORPORATION COMMISSION OF OKLAHOMA.

Cause No. 1,411.

Order No. 516.

To the Atchison, Topeka & Santa Fe Railway Company, Chicago, Rock Island & Pacific Railway Company, Ft. Smith & Western Railroad Company, Clinton & Oklahoma Western Railway Company, Gulf, Colorado & Santa Fe Railway Company, Kansas City, Mexico & Orient Railway Company, Kansas City Southern Railway Company, Midland Valley Railroad Company, Missouri, Kansas & Texas Railway Company, Missouri, Oklahoma & Gulf Railway Company, Oklahoma Central Railway Company, St. Louis, El Reno & Western Railway Company, St. Louis, Iron Mountain & Southern Railway Company, St. Louis & San Francisco Railroad Company, and Wichita Falls & Northwestern Railway Company.

It is hereby ordered that on and after the 30th day of September, 1911, the railroads and railways named above shall not assess or collect a greater rate for the shipment, in carload lots, of the commodities named herein between points on their lines in this state than provided herein between points on their lines in this state than provided herein and that, in so far as they are applicable, the rules and regulations named herein shall govern the handling and assessment of charges upon such commodities between points in the state of Oklahoma and otherwise to be governed by rules heretofore or hereafter issued by this commission.

Item No. 1.

Rates in cents per 100 pounds.

| Miles. | Col- umn 1. | Col- umn 2. | Miles. | Col- umn 1. | Col- umn 2. |
|--------|----------------|----------------|--------|----------------|----------------|
| 5 | 4 | 2.0 | 115 | 10 | 4.6 |
| 10 | 4 | 2.0 | 120 | 10 | 4.6 |
| 15 | 4 | 2.0 | 125 | 10 | 4.8 |
| 20 | 5 | 2.0 | 130 | 11 | 4.8 |
| 25 | 5 | 2.2 | 135 | 11 | 5.0 |
| 30 | 5 | 2.5 | 140 | 11 | 5.0 |
| 35 | 5 | 2.5 | 145 | 11 | 5.2 |
| 40 | 6 | 2.6 | 150 | 11 | 5.2 |
| 45 | 6 | 2.9 | 155 | 12 | 5.4 |
| 50 | 6 | 2.9 | 160 | 12 | 5.4 |
| 55 | 7 | 3.0 | 165 | 12 | 5.6 |
| 60 | 7 | 3.1 | 170 | 12 | 5.6 |
| 65 | 8 | 3.3 | 175 | 12 | 5.8 |
| 70 | 8 | 3.4 | 180 | 13 | 5.8 |
| 75 | 8 | 3.5 | 185 | 13 | 6.0 |
| 80 | 9 | 3.7 | 190 | 13 | 6.0 |
| 85 | 9 | 3.8 | 195 | 13 | 6.2 |
| 90 | 9 | 3.9 | 200 | 13 | 6.2 |
| 95 | 9 | 4.1 | 205 | 14 | |
| 100 | 9 | 4.2 | 210 | 14 | |
| 105 | 10 | 4.4 | 215 | 14 | |
| 110 | 10 | 4.4 | 220 | 14 | |

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| Miles | Col- umn 1. | Col. umn 2. | Miles | Col- umn 1. | Col. umn 2. |
|-------|----------------|----------------|-------|----------------|----------------|
| 225 | 14 | | 320 | 17 | |
| 230 | 15 | | 330 | 17 | |
| 240 | 15 | | 340 | 17 | |
| 250 | 15 | | 350 | 17 | |
| 260 | 16 | | 360 | 18 | |
| 270 | 16 | | 370 | 18 | |
| 280 | 16 | | 380 | 18 | |
| 290 | 16 | | 390 | 18 | |
| 300 | 16 | | Over | | |
| 310 | 17 | | 390 | 18 | |

When exact distance is now shown use next greater distance.

Item No. 2.

Rates named column 1 of item No. 1 apply on agricultural implements (rough, not shaped), bee hives (k. d. flat in bds.), billets, blocks (base corner, head, hub [rough] paving, plinth), boards (base), box lumber, boxes (k. d.), braces (telegraph and telephone), brackets (telegraph, telephone), carpenter's moulding (plain), casing, ceiling (except panel), crates (k. d.), cross arms, doors (grain), egg case material, flooring (except wood carpet or parquet), fruit packages (k. d., nested or in racks), guttering (rough), handle timber (rough, not shaped), heading, hoop poles, hoops, lath, logs, lumber (except walnut, cherry, butternut, holly and imported woods), pickets, piling, pins, poles (telegraph and telephone), sawdust, shavings, sheathing, shingles, shingle tow, shooks, slats (bed), spools (barbed wire k. d.), staves, tan bark, tank material (sawed to shape), ties (cross and switch), tubing (well), vat material (sawed to shape), vegetable packages (k. d., nested or in racks), vehicle material (rough, not shaped), wainscoting (except panel), in straight or mixed carloads.

Item No. 3.

Rates will be made on the articles shown below by adding three (3) cents per 100 pounds to rates shown in column 1 of item No. 1: Agricultural implements (see "A" below), astragals, balusters, balustrade work, beads (angle and corner), blinds, blocks (shuttle), brackets (cornice), ceiling (panel), chair stock (see "A" below), cores, cot frame material (in the white k. d.), doors (see "B" below), doors (panel screen), fittings (pantry, k. d.), frames (blind, door, screen or window, s. u. or k. d.), gable ornaments, grille work, handle timber (see "A" below), hubs (not further finished than mortised or primed), jambs (panel), keys (tent), ladder rungs, lasts (rough), lumber (butternut, cherry, holly and walnut), mattress frame material (in the white k. d.), packing cases (k. d. flat), picker sticks, pilasters, pins (tent), poles (see "A" below), poles (tent), porch work (newels, columns, railings, balusters and post ornaments, k. d.), rods (sucker, without attachments), sash (see "B" below), screens (door and window), scroll work, seats (closet), sheathing (lath and paper combined), shelves (k. d.), shutters, slate (trunk), spindles, spokes (club turned or in the white), stair work (balusters, newels, post ornaments, railings, risers and treads (k. d.), tanks (closet k. d.), wainscoting (panel), wheelbarrow parts (handles, trays and sawed stock), vehicle parts (see "A" below), wood (built up or combined, bent or straight, including wood veneer,

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cooling tower material, ice tank tops, ice can covers), in straight or mixed carloads.

“A”—Dressed, bent, turned, tenoned or mortised, not further finished in the white.

“B”—Glazed or unglazed with common window glass or glass taking same rating as common window glass.

Item No. 4.

Rates on dowel pins and veneering (over $\frac{1}{16}$ of an inch in thickness) will be made by adding five (5) cents per 100 pounds to rates shown in column 1 of item 1.

Item No. 5.

Rate on veneering ($\frac{1}{16}$ of an inch in thickness, or less) will be made by adding ten (10) cents to rates shown in column 1 of item No. 1.

Item No. 6.

Rates on fence posts will be eighty (80) per cent. of rates shown in column 1 of item No. 1.

Item No. 7.

Rates on excelsior bolts will be fifty-six (56) per cent. of the rates shown in column 1 of item No. 1, observing minimum charge of three (3) cents per 100 pounds.

Item No. 7½.

Rates on cord wood will be fifty (50) per cent. of rates shown in column 1 of item No. 1.

Item No. 8.

Rates named in item No. 1 are for shipments moving via one line or two or more lines directly or indirectly under the same management and control. For shipments moving via two or more lines, not directly or indirectly under the same management or control, add two and one-half ($2\frac{1}{2}$) cents per 100 pounds to rates shown in column 1 of item No. 1.

In using percentages shown in items 6, 7, and $7\frac{1}{2}$ for joint line shipments ascertain through mileage and use rate shown in column 1 of item No. 1 plus two and one-half ($2\frac{1}{2}$) cents and rate will be percentage shown of that figure.

Item No. 9.

Rates shown in column 2 of item No. 1 will apply on shipments of lumber to be resawed, planed, dressed, tongued, grooved, seasoned or manufactured into box material, vehicle and agricultural implement shapes, logs (except walnut and cherry), rough staves, rough bolts, rough hickory lumber and flitches to be used in manufacture of lumber or articles taking lumber rates or arbitraries higher as specified in this order.

The above rates will apply only on condition that at least sixty (60) per cent. of the in-bound tonnage is reshipped and the line bringing the rough material to the mill is the initial carrier of the out-bound shipment.

Carriers may require the payment of the rates named in column 1 of item No. 1 on the in-bound shipment, but if such requirement is made immediate refund to the basis of rates shown in column 2 of item

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No. 1 must be made when sixty (60) per cent. of the in-bound tonnage is reshipped as provided above.

Item No. 10.

Any or all of the commodities named in items Nos. 2 to 6, inclusive, may be forwarded in mixed carloads at the carload rate at actual weight of each article in the shipment observing the highest minimum weight on any commodity in the car. Any deficiency in weight shall be charged for on the basis of the commodity which comprises the greatest portion of the shipment.

Item No. 11.

The minimum weight on articles mentioned herein will be as follows:

All articles named herein, except those shown below, in cars 35 ft. 6 in. to and including 36 ft. 6 in., 30,000 pounds. Cars over or under this length as per rule 6 B, Western Classification No. 50, or approved reissues thereof or supplements thereto.

Frames (blind, door, screen or window), s. u. or k. d., minimum weight 24,000 pounds.

Doors and sash (glazed or unglazed with common window glass or glass taking the same rating as common window glass), minimum weight 24,000 pounds.

Box shooks, lath, hoops or shingles, minimum weight 26,000 pounds.

Articles mentioned in items Nos. 7 and 9, minimum weight 40,000 pounds.

Articles mentioned in item No. 7½, minimum weight marked capacity of car, except as follows:

Where cars are loaded to full visible capacity, and the actual scale weight is less than the marked capacity of the car, the actual sale weight will apply.

Where cars are loaded to full physical capacity and are not weighed on track scales use estimated weights shown in item 12.

In no case will minimum weight be less than 34,000 pounds.

Articles requiring more than one car, account length, when loaded on two cars, minimum weight 48,000 pounds, three cars, minimum weight 72,000 pounds.

Item No. 12.

When shipments of cord wood or logs do not pass over track scales, the carload weight will be estimated on the following basis, observing established minimums:

Logs: Cottonwood, eight and one-half (8½) pounds per ft.; ash, cypress, elm, gum, maple, poplar, sycamore or walnut, ten (10) pounds per foot; hickory or oak, twelve (12) pounds per foot.

Cordwood: The following estimated weights will apply: Green wood, per cord, 4,500 lbs.; seasoned wood, per cord, 3,500 lbs.

The weight of four-foot wood will be determined by the measurement as follows:

Ascertain the number of tiers or racks in each car, and the number of cords in each tier or rack by multiplying length, breadth and height together and divide by 128. If the car cannot be opened and it is impossible to measure by tiers, measure outside of car, deducting 9 inches in length and 9 inches in breadth, which will give the inside measurement. Multiply the length, breadth and height of the car,

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inside measurement, together and divide by 128. From the result deduct 20% for unoccupied space. The result will be the number of cords in car. The weight of two-foot wood, if piled in car, will be ascertained by measurement, as provided above. If not tiered or piled in car, base your estimate on internal measurement of space occupied and allow 20% for unoccupied space.

Item No. 13.

On shipments of commodities mentioned herein, except logs, an allowance of not to exceed five hundred (500) pounds per car, observing established minimums, will be made for weight of standards, strips and supports used on shipments loaded on flat or gondola cars.

Item No. 14.

The railways and railroads named herein shall prepare and publish joint tariffs to carry out the provisions of this order and such tariffs shall be filed with each agent and two copies for the account of each carrier named herein shall be filed in the office of this commission.

This commission reserves the right to direct the basis for revenue divisions wherever carriers fail to agree.

Item No. 15.

All orders or parts of orders heretofore issued by this commission which in any way conflict with the rules named herein are hereby canceled and superseded, the commission reserving the right to relieve the carriers, consignors or consignees of any hardships caused by the enforcement of the rules and regulations named herein either before or after movement

—be and are hereby made effective as of the date of the original order, to wit, the 30th day of September, 1911. Tariff under this order to become operative as to the various lines when the schedule of rates is printed and filed with the commission.

All the Justices concur.

CHICAGO, R. I. & P. RY. CO. et al. v. STATE.

No. 3473. Opinion Filed December 5, 1912.

(128 Pac. 907.)

CARRIERS—Rates—Regulation—Corporation Commission. An appeal having been prosecuted from an order of the Corporation Commission promulgating rates, rules, and regulations, and the commission having filed in this court its recommendations as to the modification of said order, and the appellants and appellee appearing and agreeing to submit said appeal on the record and said recommendations, and waiving the filing of briefs, it not being pointed out by specification of error wherein such order so

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modified would be unreasonable and unjust, held, that the recommendation of the commission will be adopted, and that said order will be affirmed as modified under said recommendation.

(Syllabus by the Court.)

Appeal from State Corporation Commission.

Proceeding by the State Corporation Commission for the establishment and promulgation of railroad rates on coal. From an order fixing the rates, the Chicago, Rock Island & Pacific Railway Company and others appeal. Modified and affirmed.

C. O. Blake, Cottingham & Bledsoe, R. A. Kleinschmidt, C. L. Jackson, E. A. De Meules, E. R. Jones, Geo. E. Black, L. P. Miles, and Chas. E. Warner, for appellants.

Chas. West, Atty. Gen., and Chas. L. Moore, Asst. Atty. Gen., for the State.

WILLIAMS, J. The Corporation Commission of the state of Oklahoma has filed, in writing, certain recommendations for modification by this court as to Order No. 502, involved in this appeal. All the attorneys for appellants, and the Attorney General, for the state, appeared and in open court by agreement submitted the case upon the record in this appeal and said recommendations of the commission, and waived the filing of briefs.

It is ordered that the commission's recommendations be adopted, and in lieu of the rates, rules, and regulations contained in the original Order No. 502, that the rates, rules, and regulations contained in said recommendations, which are as follows :

CORPORATION COMMISSION OF OKLAHOMA

Cause No. 1351.

Order No. 502.

To the Atchison, Topeka & Santa Fe Railway Company, Chicago, Rock Island & Pacific Railway Company, Clinton & Oklahoma Western Railway Company, Ft. Smith & Western Railroad Company, Gulf, Colorado & Santa Fe Railway Company, Kansas City, Mexico & Orient Railway Company, Kansas City Southern Railway Company, Midland Valley Railroad Company, Missouri, Kansas & Texas Railway Company, Missouri, Oklahoma & Gulf Railway Company, Oklahoma Central Railway Company, St. Louis & San Francisco Railroad Company, St. Louis, El Reno & Western Railway Company, St. Louis, Iron Mountain & Southern Railway Company, and Wichita Falls & Northwestern Railway Company:

Opinion of the Court.

It is hereby ordered that on and after the 31st day of July, 1911, no railroad or combination of railroads doing business in the state of Oklahoma shall charge, assess or collect a greater rate for the shipment of the commodities named herein than are herein provided, and that the following rules in so far as they are applicable shall govern the handling and assessment of charges upon such commodities between points in the state of Oklahoma on the lines of the railroads and railways named above:

Item No. 1.

| Miles | Col- umn 1. | Col- umn 2. | Miles | Col- umn 1. | Col- umn 2. |
|-------|----------------|----------------|-------|----------------|----------------|
| 5 | 25 | 21 | 160 | 130 | 110 |
| 10 | 31 | 26 | 170 | 135 | 115 |
| 15 | 37 | 31 | 180 | 140 | 119 |
| 20 | 42 | 36 | 190 | 145 | 123 |
| 25 | 47 | 40 | 200 | 150 | 127 |
| 30 | 51 | 43 | 210 | 154 | 131 |
| 35 | 55 | 47 | 220 | 158 | 134 |
| 40 | 59 | 50 | 230 | 162 | 138 |
| 45 | 63 | 54 | 240 | 166 | 141 |
| 50 | 67 | 57 | 250 | 170 | 145 |
| 55 | 71 | 60 | 260 | 174 | 148 |
| 60 | 75 | 64 | 270 | 178 | 151 |
| 65 | 79 | 67 | 280 | 182 | 155 |
| 70 | 82 | 70 | 290 | 186 | 158 |
| 75 | 85 | 72 | 300 | 190 | 162 |
| 80 | 88 | 75 | 310 | 194 | 165 |
| 85 | 91 | 77 | 320 | 198 | 168 |
| 90 | 94 | 80 | 330 | 203 | 173 |
| 95 | 97 | 82 | 340 | 206 | 175 |
| 100 | 100 | 85 | 350 | 210 | 179 |
| 110 | 105 | 89 | 360 | 214 | 182 |
| 120 | 110 | 93 | 370 | 218 | 185 |
| 130 | 115 | 97 | 380 | 222 | 189 |
| 140 | 120 | 102 | 390 | 226 | 192 |
| 150 | 125 | 106 | 400 | 230 | 195 |

Item No. 2.

Rates named in column 1 of item 1 shall apply upon carload shipments of coal and coke.

Item No. 3.

Rates named in column 2 of item 1 shall apply upon shipments of slack coal in carload lots.

Item No. 4.

Slack coal shall be considered as any and all coal that will pass through a bar screen with bars one and five-eighths inches apart or through a round hole two and one-half inches in diameter. All other coal shall move under the designation of coal and coke.

Item No. 5.

The minimum weight upon carload shipments of the commodities named herein shall be the marked capacity of the car except when cars are loaded to their full visible capacity actual weight, but not less than 30,000 lbs. shall govern.

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Item No. 6.

Rates named in columns 1 and 2 of item 1 are for application over one line or two or more lines which are under the same management and control either directly or indirectly, in making joint rates over two or more lines not directly or indirectly under the same management and control add 15c per ton shipments moving two lines and 20c per ton for shipments moving via three or more lines.

Item No. 7.

Where shipments are reconsigned either before or after reaching the first destination and such reconsignment causes a movement of over three hundred miles from point of origin to final destination, 2c per ton for each ten miles or fraction thereof in excess of three hundred miles shall be added to the rates named in columns 1 and 2 of item 1.

Item No. 8.

The railways and railroads named herein shall prepare and publish joint tariff to carry out the provisions of this order. One copy of such tariff shall be filed at each freight depot of each and all of the carriers named herein and two copies for account of each carrier named herein shall be filed with this commission.

This commission reserves the right to direct the basis for revenue divisions wherever carriers fail to agree.

Item No. 9.

All orders or parts of orders heretofore issued by this commission which in any way conflict with the rules named herein are hereby canceled and superseded, the commission reserving the right to relieve the carriers, consignors or consignees of any hardships caused by the enforcement of the rules named herein either before or after movement.

In connection with the above order it has been represented to the commission that, without detriment to the consumers of the state, a simplified adjustment of group rates on coal can be inaugurated, and pending the establishment of such rates on a group basis the carriers may observe the present voluntary rates as a maximum, but refunds shall be made on the basis of the rates contained in the above recommendation

—be and are hereby made effective as of date of the said original order, to wit, the 30th day of July, A. D. 1911. Tariff under this order to become operative as to the various lines when the schedule of rates is printed and filed with the commission.

Further, it being made to appear to this court by written representation of the Corporation Commission that there is now pending and under consideration a simplified adjustment of group rates on coal, at the suggestion and recommendation of said commission, pending the establishment of such rates on such basis, the carriers may observe their voluntary rates as a maximum, but refunds shall be made on the basis of the above stated rates.

All the Justices concur.

Chicago, R. I. & P. Ry. Co. et al. v. State.

CHICAGO, R. I. & P. RY. Co. *et al.* v. STATE.

No. 3673. Opinion Filed December 5, 1912.

(128 Pac. 908.)

CARRIERS—Rates—Regulation—Corporation Commission. An appeal having been prosecuted from an order of the Corporation Commission promulgating rates, rules, and regulations, and the appellants and appellee appearing in open court and agreeing to submit said appeal on the record, and waiving the filing of briefs, it not being pointed out by specification of error wherein such order would be unreasonable and unjust, held, that said order will be affirmed.

(Syllabus by the Court.)

Appeal from State Corporation Commission.

Proceeding by the State Corporation Commission for the establishment and promulgation of rates for the transportation of street and building materials. From an order fixing the rates, the Chicago, Rock Island & Pacific Railway Company and others appeal. Affirmed as modified.

C. O. Blake, Cottingham & Bledsoe, R. A. Kleinschmidt, C. L. Jackson, E. A. De Meules, E. R. Jones, Geo. E. Black, L. P. Miles, and Chas. E. Warner, for appellants.

Chas. West, Atty. Gen., and *Chas. L. Moore*, Asst. Atty. Gen., for the State.

WILLIAMS, J. All the attorneys for appellants, and the Attorney General, for the state, appeared in open court, and by agreement submitted the case upon the record in this appeal and waived the filing of briefs.

It is ordered that the rates, rules, and regulations contained in Order No. 515, which is involved herein, become effective as of the date of the said original order, to wit, the 30th day of September, A. D. 1911. Tariff under this order to become operative as to the various lines when the schedule of rates is printed and filed with the commission.

All the Justices concur.

Warren v. Caruthers, District Judge.

WARREN v. CARUTHERS, *District Judge.*

No. 4068. Opinion Filed December 5, 1912.

(128 Pac. 1132.)

Application of Frank L. Warren for writ of mandamus to John Caruthers, District Judge. Proceeding dismissed.

Warren & Miller, for petitioner.

Gibson & Thurman, for respondent.

PER CURIAM. June 12, 1912, there was filed in this court the petition of Frank L. Warren, praying a writ of mandamus be issued to Hon. John Caruthers, as judge of the Ninth judicial district of Oklahoma, requiring him to certify to his disqualification to sit in a cause then pending before him, the title of the same being Warren v. Canard, the judgment in which on appeal in a prior trial from the same court was reversed. *Warren v. Canard*, 30 Okla. 514, 120 Pac. 599. In a brief filed November 19, 1912, the respondent asserts that it is not only not true that he is anxious to sit again as judge in the said case, but that no kind of an inducement except a direct command from this court could induce him to sit therein. Under these circumstances a consideration and determination of the issues presented by the parties is not essential. This court, with that statement before it, cannot assume that respondent will do otherwise than to provide means according to law for another judge to sit in the trial of the case. Under these circumstances the issues made by the parties on the record are purely hypothetical, which this court has frequently held it will not determine. The proceeding is therefore, accordingly, dismissed.

GALBREATH GAS CO. v. LINDSEY *et ux.*

No. 2071. Opinion Filed December 7, 1912.

(129 Pac. 45.)

1. **PLEADING—Defective Verification—Waiver.** Where a temporary restraining order is granted by a judge at chambers, without notice, solely upon the face of a petition improperly verified, the defect in the verification is waived where, without raising it, defendant answers to the merits.
2. **INJUNCTION—Petition—Irreparable Injury.** Petition examined, and held that a threatened irreparable injury for which the law affords no adequate remedy is disclosed on its face, and that the same properly invokes the aid of a court of equity in the absence of an allegation that defendant is insolvent.
3. **PLEADING—Demurrer—Form.** A demurrer to an answer, which alleges "that the second clause of the first paragraph of the answer is not responsive to an allegation contained in the petition," and that "the third clause of said paragraph is evasive," and of another paragraph "that the same states conclusions of law and is not responsive * * * to the allegations * * * of the petition," is insufficient under the statute, and was improperly sustained.
4. **INJUNCTION—Petition—Verification—Statutes.** Under Comp. Laws 1909, sec. 5757, providing that an injunction may be granted when it satisfactorily appears to the court or judge, by the affidavit of the plaintiff or his agent, that plaintiff is entitled thereto, a petition verified on information and belief only is insufficient.

(Syllabus by the Court.)

Error from District Court, Tulsa County;
L. M. Poe, Judge.

Suit by Lee Lindsey and Lila D. Lindsey, his wife, against the Galbreath Gas Company. Judgment for plaintiffs, and defendant brings error. Reversed and remanded, with directions.

Haskell B. Talley, for plaintiff in error.

Chas. L. Fildes, for defendants in error.

TURNER, C. J. On May 27, 1909, Lee Lindsey and wife, Lila D. Lindsey, filed in the district court of Tulsa county their

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petition, the object of which was to restrain the defendant from disconnecting its gas supply pipes from plaintiffs' premises, and from refusing to supply the same with gas for heating and lighting the residence and running an engine, situate on the premises, used for pumping water throughout the tenements located thereon, basing their right to the gas supply upon an alleged contract with defendant, a copy of which is filed as an exhibit to their petition. They also sought to enjoin the collection of defendant's claim of \$160 for gas claimed to have been furnished by defendant under said contract, upon the ground that the same was an excessive charge under the contract. On the same day application was made to the district judge, at chambers, for a restraining order, which was granted, without notice, solely upon the face of the petition, which was verified thus:

"State of Oklahoma, County of Tulsa—ss.:

"Before the subscriber personally appeared Lee Lindsey, who, being duly sworn, says that he is one of the plaintiffs in the foregoing petition, and that each and every allegation therein made is true to the best of their knowledge and belief.

"LEE W. LINDSEY.

"Subscribed and sworn to before me this 26th day of May, A. D. 1909.

"PETER DEICHMAN, Notary Public."

On June 2d, to show cause, defendant filed a motion to vacate the order, on the ground that the same was unsupported by sufficient affidavit, and on the same day a general demurrer, which was overruled; whereupon, on June 5, 1909, it filed a motion to dissolve the injunction. On June 12, 1909, this motion, which is verified, but unsupported by affidavit, was overruled; whereupon, on June 14, 1909, defendant filed substantially the same motion thus supported, which was met with counter affidavits and also overruled. Thereupon defendant answered, in effect a general denial, and, after making certain specific denials, for further defense said:

" * * * That the plaintiffs have used on their said premises the gas of the defendant for the purpose of running a gas engine which consumes a large amount of gas, and an amount, in all probability, exceeding the gas consumed for all other purposes by the plaintiffs in their residence for heating and lighting

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purposes; that the use of the defendant's gas for the running of said gas engine was not contemplated in said alleged contract of December 10, 1906, and that the defendant did not, under said contract, or under any other contract, agree to furnish the plaintiffs with gas for the use of said gas engine, and that by so using the gas of the defendant, plaintiffs have avoided and rendered inoperative said contract; and that the plaintiffs have estopped themselves to claim any right under said contract of December 10, 1906, by reason of the fact that the said plaintiffs have so used the gas of the defendant for other and additional purposes not contemplated under said alleged contract."

To this plaintiffs demurred "* * * upon the grounds that said answer is insufficient, in that the second clause of the first paragraph is not responsive to any allegation contained in the petition, and because the third clause of said paragraph is evasive, and does not deny the execution of the contract therein described. And, for further grounds of demurrer, the second paragraph of said answer states conclusions of law and is not responsive, either by way of avoidance, confession, or denial of the allegations, or either of them, contained in the said petition"—which was sustained and exceptions saved, and, on refusing to plead further, judgment was rendered and entered against defendant by "default," the injunction made perpetual, and defendant brings the case here.

It is first contended that the court erred in refusing to dissolve the restraining order, for the reason that the same was granted upon the face of the petition improperly verified. That such it was seems clear. Comp. Laws 1909, sec. 5757, says:

"The injunction may be granted at the time of commencing the action, or any time afterwards, before judgment by the district court, or the judge thereof, or in his absence from the county, by the county judge, upon its appearing satisfactorily to the court or judge, by the affidavit of the plaintiff or his agent, that the plaintiff is entitled thereto."

In *City of Atchison, etc., v. Bartholow et al.*, 4 Kan. 139, the temporary injunction was granted, as here; the petition being sworn to upon the information and belief of petitioner. In holding the same insufficient, and that the court erred in receiving

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it in evidence over objection and in granting the injunction thereupon, the court said:

"Section 248 of the Code provides that 'a temporary injunction may be ordered upon it appearing satisfactorily to the court or judge, by the affidavit of the plaintiff or his agent, that the plaintiff is entitled thereto.' The affidavit of the plaintiff to the necessary facts will, under this provision, be sufficient, and the petition, if properly verified, may be used as an affidavit, *i. e.*, it may be read as testimony. To determine whether the petition here was admissible as testimony, it will be necessary to ascertain the legal requirements of an affidavit."

And, after holding that such it did not possess, said:

"The petition, as verified, was not 'a declaration under oath,' and it was error to permit it to be read, against the objection of the defendant, for which reason the order of injunction must be vacated."

See, also, *Long v. Kasebeer*, 28 Kan. 226; *State ex rel. v. Loomis*, 46 Kan. 107, 26 Pac. 472; *Center Tp. v. Hunt*, 16 Kan. 430; *State v. Bd. Co. Com'rs*, 35 Kan. 150, 10 Pac. 535; *Ruge v. Apalachicola, etc., Co. et al.*, 25 Fla. 656, 6 South. 489; *Lee v. Clark*, 49 Ga. 81; *Kaehler v. Dobberpuhl*, 56 Wis. 497, 14 N. W. 631.

And so we might hold, and vacate the order for insufficient verification, were it not for the fact that the court was not called on to pass upon the motion intended to raise the question, filed June 2d, and the question thereby sought to be raised cannot be raised in this court for the first time. 2 High on Inj. sec. 1569, says:

"So the insufficiency of the verification, as the basis for a preliminary injunction, cannot be raised upon an appeal from a final decree granting a perpetual injunction; and in such case it is immaterial that the bill was improperly verified, or that a preliminary injunction was improperly granted upon such verification. So, although a preliminary injunction has been improperly granted because of the lack of verification to the bill, yet if it has been allowed to stand until the hearing, and the evidence discloses sufficient equity to support it, it should be perpetuated. And an objection for want of proper verification must be taken in apt time, and if raised after a hearing upon the merits it comes too late."

Opinion of the Court.

Or, as stated by us in the syllabus in *Glasco v. School Dist. No. 22, McClain County*, 24 Okla. 236, 103 Pac. 687:

“Any defect or irregularity involved in the verification of a petition for an injunction is waived where, without raising it, defendant answers to the merits.”

It is next contended by defendant that the court erred in overruling its demurrer to the petition, because, it says, the same disclosed on its face that plaintiffs have an adequate remedy at law. The point is not well taken. The petition substantially states that on December 10, 1906, plaintiffs and defendant entered into a contract, whereby defendant agreed to furnish to plaintiffs, for the period of fifteen years, all the gas they might find necessary to use for lighting and heating at their residence, situated and described on certain lands in Tulsa county, at the rate of \$6 per annum according to the contract filed as an exhibit; that pursuant thereto plaintiffs forthwith provided the tenements on the described premises with necessary pipes for conveying gas; that defendant thereupon connected the same with its supply pipe, at the same time placing a meter in said tenements for the measurement of gas so furnished and consumed, and thereupon furnished the same as provided in said contract; that a short time thereafter defendant, at the request of plaintiffs and pursuant to said contract, also connected its pipes with a certain engine and boiler placed on the premises by plaintiffs for the purpose of pumping water from a well thereon into and through said tenements; that the furnishing of said gas to be used, as aforesaid, was at that time regarded and considered by the parties to the contract to be in keeping with its terms, and was so regarded by them up to May 16, 1909, at which time defendant presented plaintiffs a bill for about \$160 for gas supplied to said engine and boiler, and is now threatening to disconnect its pipes, unless said bill is paid; that plaintiffs will be deprived of light, heat, and water for said premises, unless defendant is enjoined from carrying said threat into execution; that plaintiffs have at all times complied with their part of said contract, and have paid for gas thus consumed \$6 per annum up to the date aforesaid; that at the time of connecting its pipes with

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said engine and boiler, as stated, no meter was installed by defendant for the measurement of gas thus to be consumed, nor has it since installed a meter for that purpose, and that its demand for payment of \$160 is unjust and in violation of said contract, that the threatened act will work irreparable injury to plaintiffs, and is imminent; wherefore they pray that defendant be enjoined, etc.

In *Edwards v. Milledgeville Water Co.*, 116 Ga. 201, 42 S. E. 417, Edwards brought a petition for injunction against the company, in which he sought to enjoin it from disconnecting its water main from the private pipe running therefrom to his residence, and from interfering with his use of the water at his residence, under the terms of a contract which he set up as made between himself and the company. The court said:

"In *Horsky v. Helena Consolidated Water Co.*, 13 Mont. 229, 33 Pac. 689, the plaintiffs, who were the owners of a large brewery, sought an injunction to prevent the defendant from shutting off water from the plaintiffs' private pipe, which connected with the defendants' system of piping. The court held: 'An injunction will lie to enjoin a water company from breaking its contract to supply water to a brewery, when turning off the water would stop the brewery, destroy a large quantity of malt, and injure the brewers' trade.' Pemberton, J., in the opinion, said: 'We think the facts stated in the complaint, which are confessed by the demurrer, entitle the appellants to invoke the equity jurisdiction of the court, and to the negative and preventative relief of injunction' [citing *Callery v. New Orleans Water Works Co.*, 35 La. Ann. 798; *Brown v. Frankfort* (Ky.) 9 S. W. 384; *Sedalia Brewing Co. v. Sedalia Water Works Co.*, 34 Mo. App. 50; *Graves v. Key City Gas Co.*, 83 Iowa, 714, 50 N. W. 283; *School Dist. v. Ohio Valley Gas Co.*, 154 Pa. 539, 25 Atl. 868]. The plaintiff is without an adequate remedy at law. A court of law could neither prevent the defendant from depriving him of the water, nor restore to him such use after he had been once deprived of it; and the damages which he would sustain in the future, during the long period covered by the contract, by being deprived of the use of a plentiful supply of pure water flowing through pipes upon his premises, and easily and conveniently accessible at all times for the varied necessities and even luxuries of a household, would be difficult to ascertain, and could not, with any certainty, be estimated. Even if the plaintiff could, by erecting and maintaining a private system of waterworks,

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supply his residence and premises with water in the same manner and to the same extent that the defendant now does under its contract with him, the damages which the plaintiff would sustain by being deprived of the use of the water, as now supplied to him, during the period of time required for him to complete his own water plant would be practically impossible of ascertainment with any degree of certainty, to say nothing of the necessity, in order to arrive at the amount of his damages, of estimating the cost of constructing, keeping in repair, and operating, from year to year, such private works"

—and held that the petition was improperly dismissed.

Sickles v. Manhattan Gas Light Co., 64 How. Prac. (N. Y.) 33, was a motion to continue a temporary injunction to restrain defendants from removing the meter or cutting off the supply of gas from plaintiff's premises. Plaintiff asserted that the bill presented was unjust. He prayed that the amount due the company be ascertained, and that the company be directed to accept the sum so ascertained and restrained from removing the meter. The court sustained the motion, and in passing said:

"The learned counsel for the defendant contend upon the argument that in a case of this character an injunction should not be granted, for the reason that the defendant is perfectly responsible, and that the plaintiff could have paid the amount demanded of him under protest, and brought an action to recover the amount illegally demanded from him. In this view I do not concur, for the reason that it has long been settled that a court of equity will intervene by injunction to prevent irreparable mischief. This seems to me to be a case in which, if the plaintiff is right, it cannot be justly claimed that he can be fully compensated by an action for damages. The use of gas in cities has become almost as great a necessity as the use of water, and an illegal deprivation of one or the other, particularly where such use is for ordinary domestic and family purposes, would cause, I think, such damage as to call for the interposition of a court of equity. See *Cromwell v. Stevens*, 2 Daly, 15."

See, also, 2 Hughes on Injunctions, sec. 1122a; *White v. Fayette Fuel & Gas Co.*, 139 Pa. 492, 20 Atl. 1062; *Xenia Real Estate Co. v. Macy*, 147 Ind. 568, 47 N. E. 147; *Brauns v. Glesige*, 130 Ind. 167, 29 N. E. 1061.

We are therefore of opinion that the demurrer should have been overruled.

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But the case must be reversed because the court erred in sustaining the demurrer to defendant's answer. This for the reason that a demurrer will not lie against a pleading defective only as alleged therein. If it were true that the "second clause of the first paragraph of the answer is not responsive to any allegation contained in the petition," or that "the third clause of said paragraph is evasive," and of another paragraph "that the same states conclusions of law, and is not responsive * * * to the allegations * * * of the petition," these are not grounds for demurrer, but rather for a motion to strike for surplusage and a motion to make more definite and certain. Comp. Laws 1909, secs. 5629, 5659; 6 Enc. Pldg. & Prac. 309. The last authority cited, at page 309, says:

"Where the causes for which parties may demur to pleadings are fixed by statute, those causes are exclusive, and no other ground of demurrer will be entertained by the court."

At page 317 such a demurrer as the one here under consideration is termed an insufficient demurrer, of which a number of examples are there given. In the cases cited it is uniformly held that such present no issue of law, and should be overruled. And in *Burnette v. Elliott*, 72 Kan. at page 627, 84 Pac. at page 375, the court said:

"The complaint that the petition offends the rule regarding clearness and conciseness of statement will not avail, as indefiniteness and informality cannot be reached by a demurrer, much less by an objection to evidence."

31 Cyc. 282 says:

"Except in a few states where the Code enumerates ambiguity, indefiniteness, or uncertainty as a ground of demurrer, no demurrer will lie in the Code states for uncertainty or indefiniteness; a motion to make more definite and certain being the proper remedy."

Burnette v. Elliott, 72 Kan. 624, 84 Pac. 374; *Street R. Co. v. Stone*, 54 Kan. 83, 37 Pac. 1012; *McPherson v. Kingsbaker*, 22 Kan. 646; *Western Massachusetts Ins. Co. v. Duffey*, 2 Kan. 347; *Guthrie v. Shaffer*, 7 Okla. 459, 54 Pac. 698.

In point is also *Stiles, Treas., v. City of Guthrie*, 3 Okla. 34, 41 Pac. 386, where the court said:

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"There was, however, no error committed in overruling the demurrer upon the ground of this misjoinder, for our statute does not make misjoinder of parties, either plaintiff or defendant, a ground of demurrer; and, although it may plainly appear on the face of the petition that there is a misjoinder of parties in one or both of these respects, it is not a defect in a petition for which a demurrer lies. *Winfield Town Company v. Maris*, 11 Kan. 128; *McKee v. Eaton*, 26 Kan. 226; *White v. Scott*, 26 Kan. 476; *Hurd v. Simpson*, 47 Kan. 372 [27 Pac. 961]."

See, also, *Owen et al. v. City of Tulsa*, 27 Okla. 268, 111 Pac. 320, where this case is cited with approval.

The cause is therefore reversed and remanded, with directions to overrule said demurrer to the answer and proceed to the trial of the cause upon its merits.

All the Justices concur.

CITY STATE BANK OF HOBART v. PICKARD.

No. 2079. Opinion Filed December 7, 1912.

(129 Pac. 38.)

1. **BILLS AND NOTES—Rights and Liabilities on Transfer—Bona Fide Purchasers.** The indorsee of a negotiable promissory note for value and before maturity from another who is the apparent owner obtains a good title, and, in order to defeat his recovery thereon against the maker, defendant must not only plead facts and circumstances that would cause one of ordinary prudence to suspect that the person from whom he obtained it had no interest in it, but must go further and plead that the indorsee had actual notice thereof.
2. **SAME—Actions—Pleading.** In an action by an indorsee on a note, the plea of defendants held not to show that the indorser had no title to the note, or that the indorsee had notice that he had no title.

(Syllabus by the Court.)

Error from District Court, Kiowa County;
James R. Tolbert, Judge.

Action by the City State Bank of Hobart against H. G. Pickard. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with instructions.

City State Bank of Hobart v. Pickard.

W. A. Phelps, for plaintiff in error.

TURNER, C. J. On January 25, 1909, the City State Bank of Hobart, plaintiff in error, in the district court of Kiowa county, sued, in the first count, H. G. Pickard, one of the defendants in error, on a promissory note for \$185, dated April 11, 1908, whereby defendant promised to pay to the order of Earl Davidson that amount, with interest, on December 1, 1908, and which said note had been indorsed by him to plaintiff for value and before maturity. In the second count plaintiff sued Earl Davidson as indorser, and in the third count both Pickard and Davidson as maker and indorser thereof, respectively.

Davidson made no defense. After demurrer thereto filed and overruled, Pickard, in the first paragraph of his answer, admitted the corporate existence of plaintiff, but denied each and every other allegation contained in the petition not in his answer specifically admitted. And, as his second defense, therein alleged that on January 1, 1908, R. E. Hobbs and Earl Davidson were litigating over a certain piece of land (describing it), both of whom claimed to be the owner; that, desiring to rent the place pending the litigation, defendant entered into possession thereof with the understanding and agreement between Hobbs, Davidson, and himself that he would farm the same that year and pay therefor as rent to the winner one-third of all crops of grain raised thereon and one-fourth of all the cotton; that pursuant to said agreement he cultivated the land, and while so doing, on April 11, 1908, Davidson induced him to commute the rents to \$185, which was done, whereupon he executed the note in controversy; that the same was executed in plaintiff's bank in the presence of its cashier, who heard defendant call the attention of Davidson to the agreement aforesaid; that at the September term, 1908, of the district court of Kiowa county, Hobbs prevailed in the litigation and recovered judgment against Davidson, whereupon defendant, by virtue of the terms of said agreement, became liable to him for the rent of said land; that plaintiff had full notice of the agreement as stated and the terms and conditions upon which said note was executed prior to its indorsement by the payee, by reason of all of which, he says, the

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consideration therefor has failed. In the second paragraph, for another defense, he alleged that on October 17, 1908, said Hobbs, in an action then pending before a justice of the peace in that county, wherein he was plaintiff and defendant and said Davidson and another were defendants, recovered judgment against said Davidson for the restitution of said land, which was not appealed from and now remains in full force and effect; that by reason thereof defendant's right of possession thereto had failed, and defendant can no longer hold possession of the premises under Davidson as landlord; that the consideration of the note had failed; and that he had not at the time of the rendition of said judgment gathered his crops raised on the place during that year. In a third paragraph, for another defense, he alleged that on January 13, 1909, said Hobbs, electing to ratify said agreement between defendant and said Davidson from a commutation of rent to a rental in cash as stated, in an action then pending before a justice of the peace in that county, wherein said Hobbs was plaintiff, and defendant in error and said Davidson were defendants, sued to recover a sum of \$185 rent for said land, in which said action he recovered judgment for \$170, the balance due upon said note; that the judgment remains unpaid and unappealed from; that the full amount thereof had been paid into court by defendant; that by reason thereof the consideration for said note had failed; that plaintiff had notice of the pendency of said suit and was a party thereto, but failed to set up his claim against defendant, and upon its own motion was dismissed as a party to the suit.

When to said second, third, and fourth defenses a demurrer was overruled, the case was brought here, and said action of the court assigned as error. As the note is negotiable and is alleged and admitted to have come into the hands of plaintiff as indorsee of the apparent owner for value and before maturity, in order to defeat recovery thereon (no fraud being claimed), it was necessary for defendant not only to plead that the bank as indorsee took it knowing facts and circumstances that would cause one of ordinary prudence to suspect that Davidson had no interest in it, but he must go further and plead that the bank had actual

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notice of that fact. Or as stated in the syllabus in *Swift et al. v. Smith's Adm'rs*; 102 U. S. 442, 26 L. Ed. 193:

"One who purchases mercantile paper before due, from another who is apparently the owner, though he may know facts and circumstances that would cause one of ordinary prudence to suspect that the person from whom he obtained it had no interest in it, can lose his right only by actual notice or bad faith."

Applying this rule and construing the pleading liberally with a view to substantial justice, it cannot fairly be said that the same states facts sufficient to show that Davidson had no title to the note, much less that the bank took it as his indorsee with actual notice thereof. The most that can be said of the second defense is it fairly states that, although the maker agreed to pay a share of the crop as rent to the winner of the land, he nevertheless, in the absence of one of the parties to the agreement, repudiated the same and agreed with the other to attorn to him as his landlord, in a certain amount, and executed and delivered to him therefor the note in question. What though defendant pleads that he at the same time called the attention of Davidson to the previous agreement, and that, too, in the presence of plaintiff's cashier? Called his attention for what purpose? The plea is silent. To disaffirm it as indicated by the execution of the note in controversy? Or to affirm it and to the fact that the previous agreement was to remain in full force and effect and that the note was to be considered as delivered only in the event Davidson prevailed in the pending litigation over the land? If the latter, he should have pleaded it, and that the contingency had never happened, and that the bank had actual notice of this arrangement at the time it became the indorsee of the note. This, it seems, would have been a good defense. *Tovera v. Parker et al.*, ante, 128 Pac. 101. But we cannot read it into this plea upon the supposition that this is what defendant then and there called Davidson's attention to. This for the reason, among others, that we cannot presume, in the absence of averment fairly susceptible of that construction, that a note delivered when executed was not intended to take effect absolutely, but was intended to take effect conditionally. We are therefore of opinion that there is nothing in the plea to induce us to believe that Davidson

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was without title to the note, much less that the bank had notice thereof, even assuming that notice to the cashier of what was pleaded as said in his presence was notice to the bank. For the reasons stated, the court erred in overruling the demurrer to the second defense set forth in defendant's answer.

As defendant in error has filed no brief in support of the action of the court as to the remaining defenses pleaded, and as we can think of no ground upon which it could possibly be sustained, the judgment of the trial court is reversed and remanded, with instructions to proceed in accordance with this opinion.

All the Justices concur.

GOLDIE v. CORDER.

No. 2115. Opinion Filed December 7, 1912.

(129 Pac. 3.)

NEW TRIAL—Grounds—Newly Discovered Evidence—Admissions by Party. In a suit on account for \$25 per week, or in all \$900, for work done pursuant to a parol contract, and on quantum meruit for a like amount for the same services, where plaintiff recovered the full amount, and where defendant had shown due diligence in his defense, which was a denial of said contract and a set-off, held, that a motion for a new trial on the ground of newly discovered evidence, supported by affidavit that plaintiff during his term of service had admitted that he "was drawing \$20 per week," was properly sustained; the same being a distinct fact coming to defendant's knowledge after the trial, and material, and not cumulative.

(Syllabus by the Court.)

Error from Superior Court, Oklahoma County;
A. N. Munden, Judge.

Action by Wallace R. Goldie against W. T. Corder. From an order granting a new trial after verdict for plaintiff, he brings error. Affirmed.

Bolen & Adkins, for plaintiff in error.

Taylor, Pruitt & Sniggs, for defendant in error.

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TURNER, C. J. On November 6, 1909, Wallace R. Goldie, plaintiff in error, sued W. T. Corder, defendant in error, in the superior court of Oklahoma county on account for \$900 for work and labor done as a salesman in his shoe store from April 15, 1907, to June 15, 1909, at \$25 a week, pursuant to an alleged parol contract between the parties. For a second cause of action he sued in *quantum meruit* for work and labor done as a shoe salesman between those dates, alleging said services to be reasonably worth \$25 a week, or in all \$900. For answer defendant, after pleading a general denial, alleged by way of set-off that he had paid plaintiff certain sums set forth in his answer; that plaintiff had purchased merchandise from defendant to the amount of \$48.40, and alleged that plaintiff was absent from the store certain days during the year 1907. He denied that plaintiff was to receive for his services \$25 per week, but admitted that he was indebted to plaintiff in the sum of \$201.60 only, which he tendered. Upon the issues thus joined there was trial to a jury and judgment for plaintiff for the full amount claimed.

On November 11, 1909, defendant filed a motion for new trial. On December 30, 1909, defendant filed a second motion for a new trial upon the additional ground of newly discovered evidence, basing it upon the affidavit of C. L. James, which substantially states that on May 7, 1907, plaintiff, in a conversation with affiant, stated that he had refused to consider a proposition to purchase an interest in the shoe store of defendant, and that he was doing well and was drawing \$20 per week; that on April 18, 1908, he had another conversation with plaintiff in which he made the same statements; that affiant is a traveling salesman visiting Oklahoma City four times a year, and that upon these visits the conversations occurred; that he was well acquainted with plaintiff, having known him for about twelve years in Kansas City, Iowa, and Nebraska; "that he knows his reputation in said vicinity of the various places of residence for truth and veracity among the people he has associated with, and that his reputation is bad." Also in support of the motion defendant filed his own affidavit, in substance, that it was some two weeks after the trial when he first discovered that he could prove by the

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affiant James the matters and things set forth in his affidavit; that he first learned of the witness and the things he would testify as stated when he, on November 22, 1909, came into affiant's store in Oklahoma City; that prior to the trial he had made diligent search to find witnesses who would prove those facts, and had talked to various persons with a view to procuring said testimony; that said James has assured affiant that in case a new trial was granted he would attend and testify as set forth in his affidavit, and "that said newly discovered evidence is not merely cumulative, corroborative, or impeaching, but is new and important; that it would be likely, as affiant verily believes and charges, to change the result of a new trial." On January 1, 1910, said motion for a new trial was heard, and later sustained, and the verdict set aside and a new trial granted. Plaintiff brings the case here, and assigns for error that the court in so doing abused its discretion.

Of course, where discretion is exercised by the trial court, this court will reverse where the same has been abused. But this motion did not invoke the discretion of that court. It presented a simple and unmixed question of law, and we will not interfere, unless we can see that the court erred with reference thereto. Or, as stated in the syllabus of *J. Ten Cate v. M. E. Sharp*, 8 Okla. 300, 57 Pac. 645:

"This court will not reverse the ruling of the trial court granting a new trial, unless it can be seen beyond all reasonable doubt that the trial court has manifestly and materially erred with respect to some pure, simple, and unmixed question of law, and that except for such error the ruling of the trial court would not have been made as it was made, and that it ought not to have been so made. The Supreme Court will very seldom and very reluctantly reverse the decision or order of the trial court which grants a new trial."

In *Clifford v. Denver, etc., Ry. Co.*, 12 Colo. at page 130; 20 Pac. at page 335, the court said:

"Counsel for the appellee insist that the order of the court granting a new trial will not be as readily reversed on appeal as when the motion has been denied. That such is the general rule there is no doubt, but it should be, and always in its application has been, limited to cases where there is a discretion reposed in

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the court below, or when the new trial is granted on the ground that the verdict is against the evidence, or because injustice has been done. Where the court grants a new trial on a ground not discretionary, and errs in the application of a legal principle in so doing, such action will be corrected on appeal just as readily as if the motion had been overruled."

Stapleton et al. v. O'Hara, 33 Okla. 79, 124 Pac. 55.

But the test in these cases is as stated in *Shepherd v. Breton*, 15 Iowa, at page 90, which was an application for a new trial on the ground of newly discovered evidence. There the court said:

"It is conceded that if the court, in ordering a new trial, misapplies or mistakes a legal proposition, such ruling will be reviewed with the same freedom as if made at any other stage of the trial. In such a case this court does not supervise the discretion of the court below, but determines whether the view taken of the law was correct. And therefore, if it appeared in this case that a new trial was granted to enable defendant to obtain testimony impeaching or cumulative merely, or to introduce testimony to obtain which no sufficient diligence had been used, we should have no hesitation in reversing such order; for in such a case the court would have no discretion. The law settles the rights of the parties, and it was simply the duty of the court to declare it."

But such the court did not do, as contended. The newly discovered evidence was material, and not cumulative. The evidence is all before us. The principal issue in the case was whether plaintiff was entitled to recover of defendant a salary of \$25 a week as a salesman, either on a parol contract or on *quantum meruit*. The jury found that he was, but upon which does not appear. The plaintiff testified that he was so entitled on a parol contract; the defendant testified that he was not, and that no such contract ever existed. The newly discovered evidence is to the effect that prior to the suit and during his term of service plaintiff made to James an admission against his interest and in effect that he "was drawing a salary of \$20 a week." This was a distinct fact, and, if admitted in evidence, might change the result.

Klopp v. Jill, 4 Kan. 482, was a suit for *quantum meruit*, in which plaintiff recovered. The defense was that certain plastering in dispute was agreed to be done at the same price for

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which plaintiff plastered defendant's saloon. On a motion for a new trial on the ground of newly discovered evidence, supported by affidavit showing due diligence, and that plaintiff had admitted "he was to plaster for the same price that he did the saloon," the court held the same to be a distinct fact coming to defendant's knowledge after the trial, and material and not cumulative, and that the motion should have been sustained. In support of this, after citing *Waller v. Graves*, 20 Conn. 305, and *Guyot v. Butts*, 4 Wend. (N. Y.) 579, the court said:

"The affidavit of Stockman, offered in support of the motion for a new trial, states that Jill admitted to him (Stockman) in conversation that he was to plaster for the same price per yard that he did the saloon. Jill swore very differently on the trial. The case seems to be exactly similar to that of *Kane v. Barrus*, 2 Smedes & M. [Miss.] 313, cited in *Graham & Waterman on New Trials*, where, in an action on a promissory note against the maker in favor of plaintiff's intestate, after verdict for plaintiff, defendant produced the affidavit of witnesses that they had heard the intestate acknowledge the payment of \$900 on the note, and also his own affidavit showing that the evidence had come to his knowledge since the trial, and that he had used due diligence to discover it. *Held*, that the maker was entitled to a new trial. So, also, in *Gardner v. Mitchell*, 6 Pick. [Mass.] 114 [17 Am. Dec. 349], which was an action for a breach of warranty in the sale of oil, the evidence alleged to have been newly discovered was confessions of the plaintiff, and the question was whether it was new or only cumulative. The confession was that the oil was as good as he expected. The court held this to be a new fact, not before in the case, and awarded a new trial. I am unable to perceive any essential point of difference between these cases and that of the newly discovered evidence of Adolph Stockman, as stated in his affidavit. I think the cause of justice will be likely to be subserved by a new trial."

We are therefore of opinion that the court did not err in granting the motion for a new trial.

Affirmed.

All the Justices concur.

Hunt v. Jones.

HUNT v. JONES.

No. 2093. Opinion Filed December 7, 1912.

(128 Pac. 1094.)

PLEADING — Objections and Waiver—Irrelevancy and Redundancy.
Irrelevancy and redundancy contained in a pleading is waived by failing to move to strike it in the trial court.

(Syllabus by the Court.)

*Error from Kingfisher County Court;
John W. Graham, Judge.*

Action by Aaron A. Jones against E. W. Hunt. Judgment for plaintiff, and defendant brings error. Affirmed.

D. K. Cunningham, for plaintiff in error.

TURNER, C. J. On January 28, 1909, Aaron A. Jones, defendant in error, sued E. W. Hunt, plaintiff in error, before a justice of the peace in Kingfisher county on account for personal services in the sum of \$195, as set forth in his bill of particulars. On February 11, 1909, with his answer thereto, defendant filed his cross-bill of particulars, in which he denied each and every allegation set forth in plaintiff's petition, except as expressly admitted, and sought to recover of defendant \$232.93, as set forth therein. There was trial to a jury and verdict for plaintiff in the sum of \$35. On January 17, 1910, on trial anew in the county court, defendant filed "answer and cross-petition" and prayed judgment against plaintiff in the sum of \$200. Thereupon came plaintiff and filed his "reply and cross-bill of particulars," and, after pleading a general denial, prayed for judgment against the defendant in the sum of \$200 in addition to the damage claimed in his former bill of particulars, praying judgment for \$180. On the issues thus joined, without objection, there was trial to a jury and judgment for plaintiff in the sum of \$150, and defendant brings the case here, after motion for new trial filed and overruled.

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He assigns that the court erred in permitting plaintiff to file a reply and cross-bill of particulars, because, he says, the same introduces new matter and asks for additional affirmative relief after the issues in said cause were reached and settled. He argues that "a reply followed by a cross-bill of particulars in which new matter is alleged as a basis for further affirmative relief, or a reply with such a cross-bill of particulars incorporated therein, as in this case, is a mongrel sort of pleading, with vicious tendencies, and violates every known rule of the common law or Code of Procedure," and that a reply with such thereto attached is an "unusual appendage," which should have been severed from the *corpus* of the pleading. This may be true, but as no motion to strike was interposed in the trial court as provided by Comp. Laws 1909, sec. 5659, the objection was waived. *Savage v. Chanllis et al.*, 4 Kan. 273; 21 En. Pl. & Pr. p. 244.

Finding no error, the judgment of the trial court is affirmed.
All the Justices concur.

SEALS v. ALDRIDGE.

No. 2125. Opinion Filed December 7, 1912.

(128 Pac. 1079.)

APPEAL AND ERROR—Briefs—Abstract of Evidence—Dismissal.

Where plaintiff in error fails to observe rule 25 (20 Okla. xii, 95 Pac. viii) of this court, the proceeding in error may be dismissed.

(Syllabus by the Court.)

Error from Seminole County Court;

T. S. Cobb, Judge.

Forcible entry and detainer by R. I. Aldridge against John W. Seals and another. Judgment for plaintiff, and defendant Seals brings error. Dismissed.

J. A. Baker, for plaintiff in error.

Crump, Skinner & Fowler and *J. Ross Bailey*, for defendant in error.

Davis v. Selby Oil & Gas Co.

TURNER, C. J. On November 15, 1909, R. I. Aldridge, defendant in error, sued John W. Seals, plaintiff in error, and W. S. Bowlin, before a justice of the peace in Seminole county in forcible entry and detainer for a certain tract of land (describing it). After change of venue to another justice and default by Bowlin, on December 4, 1909, there was trial to a jury and a verdict finding "defendants" guilty. Seals alone appealed to the county court. There Aldridge moved to dismiss, alleging misjoinder of parties; but his motion was overruled, and, on trial, anew, Seals was again found guilty. After motion for a new trial filed and overruled, Seals brings the case here. But for the reason that plaintiff in error has failed to comply with rule 25 (20 Okla. xii, 95 Pac. viii) of this court, and set forth in his brief an abstract of such facts as are necessary to our full understanding of the question presented for decision, so that we need not examine the record to ascertain them, and has further failed to set forth a specification of errors as required by the same rule, we will not pass upon any of the errors sought to be raised, but will dismiss this proceeding—but not before an examination of the facts convinced us that such is in keeping with substantial justice. Dismissed.

All the Justices concur.

DAVIS v. SELBY OIL & GAS CO.

No. 1870. Opinion Filed November 16, 1912.

Rehearing Denied January 7, 1913.

INDIANS—Lease by Allottee—Conditional Approval—New Proposal—Failure of Contract—Cancellation. An oil and gas lease executed by an Indian landlord to a corporation tenant, subject to the approval of the Secretary of the Interior, was approved, conditioned upon the lessee and its sureties executing certain documents containing conditions and terms which the lessee rejected. **Held**, that such conditional approval was a new proposal, which, when not accepted by the lessee, resulted in a failure of contract, and delay of action on the part of the lessee did not result in creating one.

(Syllabus by the Court.)

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*Error from District Court, Creek County;
A. T. West, Assigned Judge.*

Action by Joseph Davis against the Selby Oil & Gas Company. Judgment for defendant, and plaintiff brings error. Affirmed.

McDougal, Lattimore & Lytle, for plaintiff in error.

George L. Mann, George S. Ramsey, L. B. Jackson, and C. L. Thomas, for defendant in error.

DUNN, J. This case presents error from the district court of Creek county, and was an action instituted on October 3, 1908, by plaintiff in error, as plaintiff, against the defendant to recover the sum of \$3,975, with interest, alleged to be due plaintiff as bonus agreed to be paid for a certain oil and gas lease. From the record it appears that on August 14, 1907, an oil and gas lease was executed by plaintiff Davis to the Selby Oil & Gas Company and Joseph Bruner, covering the allotment of plaintiff, a citizen of the Creek Nation. The agreed bonus was \$4,000, \$25 of which was paid in cash, and the balance, being the amount sued for in this case, was deposited in the form of a check in the First National Bank of Sapulpa, to be paid "when the lease taken this date is approved by the Honorable Secretary of the Interior." The lease was duly filed with the Department of the Interior, and was forwarded by the Indian agent at Muskogee to the Commissioner of Indian Affairs, with recommendation that it be approved. On October 19, 1907, Acting Commissioner C. F. Larabee submitted the said lease to the Secretary of the Interior; on October 21, 1907, the same was approved, "subject to regulations of June 11, 1907, as amended October 14, 1907," which regulation provided that any lease thereafter delivered to the lessee in which the royalty specified therein is less than the minimum rate of royalty in force at that time, shall be subject to such minimum rate instead of the rate originally specified in the lease. On September 26, 1907, the Acting Secretary of the Interior wrote a letter to the Commissioner of Indian Affairs directing him that "said section (section 16 of the Regulations of June 11, 1907) shall be regarded as a part of all

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oil and gas leases which have been heretofore, or shall be hereafter, approved by the Department of the Interior, executed in accordance with the regulations in force prior to June 11, 1907, upon the terms, and for the considerations therein prescribed, and shall be construed to supersede all terms in such leases which are inconsistent with it, but not to prevent further modification of the regulations." And that "the approval hereafter of leases executed as described in the foregoing paragraph shall be made subject to the conditions and provisions of this letter. No lease, after having been approved conditionally or in a modified form, shall be delivered or be in force until there shall be filed with the Indian agent the written consent of the lessee and his surety, or sureties, to the effect that their liability, respectively, under the lease and bond, shall be determined in accordance with the terms of the lease as approved." On November 7, 1907, the Indian agent at Muskogee wrote to the agent for the Selby Oil & Gas Company and Joseph Bruner, giving notice of the action of the department in approving the lease, enclosing blank forms of acceptance of the approval, subject to the amended regulations. Thereafter, and on January 23, 1908, in answer to a letter, F. M. Selby wrote to the United States Indian Agent, stating that "we did not execute the acceptance, accepting as final your statement that failure would result in the disapproval or cancellation of this lease;" also, that the same was then subject to cancellation, and urged that the same be canceled. Thereafter, the Selby Oil & Gas Company filed with the department a "Withdrawal of Lease by Lessee," purporting to withdraw the lease, assigning as reasons therefor, first, that there was a question as to the lessor's age; second, referring to the department's letter of November 7, 1907, and to lessee's letter of January 23, 1908, and insisting that the lease was not now subject to approval by the department. On February 10, 1908, the lessor, Joseph Davis, filed with the department a protest against the disapproval or cancellation of the said lease, and requested that the same be fully approved. A copy thereof was forwarded to the Selby Oil & Gas Company, to which Mr. Selby replied, raising the question of the age of the lessor, and requesting a thorough investigation

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thereof, "as we will insist upon a clear title before paying the balance of bonus money." On April 7, 1908, a hearing was had before a representative of the Indian agent, testimony was taken, and upon the lease being offered in evidence, in the trial of this case in the court below, it was found to contain the following indorsement: "Department of the Interior, Washington, D. C., May 20, 1908. 'Canceled.' Jesse E. Wilson, Assistant Secretary." On July 20, 1908, the United States Indian Agent wrote to the Selby Oil & Gas Company advising them that on May 20, 1908, the department canceled the said lease.

The plaintiff sets up in his petition the lease and contract with defendant, the agreement as to bonus, the approval of the lease by the Secretary of the Interior, and the refusal by the defendant to pay the agreed bonus. Defendant answered, denying the lease was ever approved by the Secretary of the Interior, alleging also that the lessor was not of age at the time of the execution thereof, and the same was of no binding force upon the defendant. Upon the issues thus joined, the cause came on for trial on October 7, 1907, and was tried to the court without a jury, and judgment was rendered for defendant. Motion for new trial was duly filed and overruled, and plaintiff has lodged his appeal in this court upon petition in error and case-made.

The lease provided for a royalty of ten per cent., and as we have seen, was executed on August 14, 1907. At that time there were in force the rules of June 11, 1907. Thereafter, and before the lease was acted upon, the Secretary promulgated his rules of October 14, 1907, in which was embodied a provision that the Secretary might from time to time increase the minimum rate of royalty to a minimum rate not exceeding $16\frac{2}{3}$ per cent., and under the letter of September 26, 1907, the Acting Secretary of the Interior wrote a letter to the Commissioner of Indian Affairs providing that no lease, after having been approved conditionally or in a modified form, *shall be delivered or be in force* until the written consent of the lessee and his surety or sureties shall be filed with the Indian agent, fixing their liability under the lease and bond in accordance with the terms of the lease as approved. After this conditional approval of the lease,

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the forms for the acceptance of the defendant and its sureties were forwarded, but they declined to execute them, and thereafter, as stated above, the lease was canceled. The course taken by the department on behalf of the plaintiff was tantamount to a conditional acceptance or a counter proposition on the part of plaintiff and the officials acting for him, and all the authorities agree that this does not constitute an agreement unless the proposal is complied with. See 1 Page on Contracts, sec. 47; Clark on Contracts, sec. 19, and authorities cited. Moreover, our statute, section 1065, Comp. Laws 1909, provides:

"An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character, which the proposer can separate from the rest, and which will include the person accepting. A qualified acceptance is a new proposal."

Under the facts in this case the approval of the lease was nothing more than a qualified acceptance, amounting in effect to a new proposal, which the defendant in this case declined. Hence, the assumed contract, which was the basis of this action, was never consummated, and the liability of the defendant thereunder never became fixed. Nor, in our judgment, will the fact that there was delay on the part of either the defendant or the department create a contract where otherwise there would be none.

The syllabus to the case of *Beers v. Mackin*, 145 U. S. 629, 36 L. Ed. 842, reads as follows:

"A writing given by the local agent of a railway company, stating that he has received of a person one-fifth payment on a tract of the company's land therein described, subject to the approval of the land commissioner of the company and sold on five years' time, is only a proposition which does not create a contract of sale binding on the company, by the failure of the commissioner to reject the proposition within a reasonable time."

The facts out of which that case grew were briefly as follows: The plaintiff in error undertook to purchase certain lands from a railway company; its agent receipted for the money as part payment made, which receipt contained the following phrase: "Subject to the approval of the land commissioners at the office of the company at Omaha, Nebraska." This receipt and payment were made March 21, 1883; notification to the defend-

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ant that the contract was not approved by the railway company was not given until June 30, 1883, and the question in that case was whether this delay on the part of the railway company created a valid contract between it and the defendant. Discussing the question, the Circuit Court, by Brewer, C. J., said:

"The face of the paper itself shows that it was subject to the approval of the land commissioner, so that even if the agent had represented that he had full authority the defendant was notified by the terms of the paper given to him that he had not, and that the whole matter was to be referred to and subject to the approval of the land commissioner. In other words, it stands simply as a proposition; no more and no less. It binds the company no more than if defendant had written to it offering to buy the land and enclosing a certain sum as part payment, and the railway company, through its proper officer, had acknowledged the receipt of the money and notified him that his proposition would be considered and subsequently acted upon. Under such circumstances would the failure to act upon the proposition within a reasonable time create a contract? A contract is said to imply the consent of two minds. There never has been an assent on the part of the railway company, and, whatever comment may be made or criticism placed upon the delay of the railway company, can it be said that it is bound by a contract to which it has never assented? When a proposition of purchase of real estate is sent by mail, must the owner decline the proposition immediately under penalty of being adjudged to have accepted it? On the contrary, is not the rule universal that the proposition must be in terms accepted before a valid contract is made?"

The question answered itself, and the conclusion was afterwards affirmed by the Supreme Court of the United States.

Holding as we do, therefore, that the approval of the lease with the conditions attached was simply a qualified acceptance and tantamount to a new proposal, which was never accepted by the defendant, the judgment of the trial court must be affirmed.

TURNER, C. J., and HAYES and KANE, JJ., concur;
WILLIAMS, J., absent, and not participating.

Holcombe v. Lawyers' Co-Operative Pub. Co.

HOLCOMBE v. LAWYERS' CO-OPERATIVE PUB. CO.

No. 4183. Opinion Filed October 22, 1912.

Rehearing Denied January 6, 1913.

APPEAL AND ERROR—Record—Time of Taking Appeal—Dismissal.

A proceeding in error commenced in this court to review a judgment rendered or order made ninety days after the close of the session of the Third Legislature of this state, after the expiration of six months from the time of the rendering of said judgment or the overruling of the motion for a new trial, will be dismissed.

(Syllabus by the Court.)

Error from Superior Court, Custer County;

J. W. Lawter, Judge.

Action between M. L. Holcombe and the Lawyers' Co-Operative Publishing Company. From the judgment, M. L. Holcombe brings error. Dismissed.

Henry Bulow, for plaintiff in error.

A. J. Welch, for defendant in error.

WILLIAMS, J. Defendant in error moves to dismiss this proceeding in error for the reason: First, that the plaintiff in error failed to give notice of the time and place of the presentation of the case-made for settlement; and, second, on the ground that the petition in error, with the case-made, was not filed with the clerk of this court within the time allowed by law for the commencement of proceedings in error to review the judgment of the lower court. Judgment was rendered in the lower court on July 5, 1911. The motion for new trial was overruled on July 17, 1911.

The Third Legislature of this state passed an act entitled, "An act to amend section 574 of chapter 66 of the General Statutes of Oklahoma, 1893, entitled 'An act to provide a Code of Civil Procedure for the territory of Oklahoma,'" which provides:

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"All proceedings for reversing, vacating, or modifying judgments or final orders shall be commenced within six months from the rendition of the judgment or final order complained of."

This act was approved on February 14, 1911, without an emergency being declared, as provided for in section 58, article 5 of the Constitution. The session of the Third Legislature ended on March 11, 1911. Said act, therefore, went into effect on June 10, 1911. This proceeding in error, therefore, must have been commenced in this court within six months after the judgment was rendered, if the judgment was sought to be reviewed by a transcript, and within six months from the day the order overruling the motion for a new trial was made, if the same has been made part of the record by means of a case-made. *Reed et al. v. Woolly*, 31 Okla. 783, 123 Pac. 1121; *Richardson et vir v. Beidleman et al.*, 33 Okla. 463, 126 Pac. 618.

This proceeding in error was commenced in this court on July 10, 1912. It follows that the same, not having been commenced within six months as required by said act, must be dismissed.

All the Justices concur.

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No. 1944. Opinion Filed January 7, 1913.

(129 Pac. 841.)

1. **INDIANS—Conveyance by Allottee—Validity—Selection of an Allotment.** F., an adult, not of Indian blood, but a member of the Cherokee Tribe of Indians, on January 27, 1905, but prior to the time of the selection of his allotment, conveyed a certain 40 acres of land, which was then a part of the public domain of the Cherokee Nation, but which was afterwards selected by him as a part of his surplus allotment. Held, that Act April 24, 1904, c. 1402, 33 St. at L. 204, removing "all restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians, who are not of Indian blood, except minors," except as to homesteads, had no application to him until after he had selected his allotment.
2. **SAME—Invalidity—Subsequent Title.** Section 642, c. 27, Mansf. Dig. of Ark. (1884), providing that: "If any person shall con-

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vey any real estate by deed, purporting to convey the same in fee simple absolute, or any less estate, and shall not at the time of such conveyance have the legal estate in such lands, but shall afterward acquire the same, the legal or equitable estate afterward acquired shall immediately pass to the grantee, and such conveyance shall be as valid as if such legal or equitable estate had been in the grantor at the time of the conveyance''—has no application to said conveyance, the same being at the time of said execution invalid.

(Syllabus by the Court.)

*Error from District Court, Mayes County;
T. L. Brown, Judge.*

Action by C. S. Wortman and R. W. Canfield against I. P. Bledsoe. Judgment for plaintiffs, and defendant brings error. Affirmed.

J. H. Langley, for plaintiff in error.

C. S. Wortman and J. I. Howard, for defendants in error.

WILLIAMS, J. On June 17, 1908, the defendants in error, hereinafter referred to as plaintiffs, commenced an ejectment action in the district court of Mayes county against plaintiff in error, hereinafter designated as defendant, for the possession of the N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 26, township 20 N., range 18 E., situated in said county. After issue was framed, the cause was submitted to the court upon the following agreed statement of facts:

"It is agreed by and between the parties to the above-entitled cause, by their respective attorneys, that the defendant has a deed from Jess Fulsom to the lands in controversy, dated January 27, 1905, the lands being the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 26, township 20, range 18, situated in Mayes county, state of Oklahoma, which said deed was filed for record in the office of the clerk of the United States Court for the Northern District of the Indian Territory, at Pryor Creek, on the 25th day of April, 1905, and duly recorded in Book C, at page 382, and which was the proper office for the recording of a deed upon said lands at the time said deed was executed, and at the time of its recording; said lands being situated in the Fifth recording district for the Indian Territory.

"It is further agreed: That the grantor, Jess Fulsom, at the time of the execution of said deed, was a Cherokee freedman,

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and was entitled to an allotment of lands in the Cherokee Nation, and that the lands therein conveyed and in controversy in this case were his surplus lands, and that said deed was executed subsequent to the act of Congress removing the restrictions on the alienation of surplus land of Cherokee freedmen. At the time of said conveyance the said grantor, Jess Fulsom, had not selected the lands described in said deed at the time of the execution thereof, as aforesaid, and did not select said lands as a portion of his allotment until the 6th day of March, 1905, and subsequent to the execution of said deed of conveyance to the defendant herein. That said deed, in addition to conveying the lands above described, also includes other lands not in controversy herein, to wit, the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 32, township 20, range 20, in what is now Mayes county, Okla.

"It is further agreed that thereafter, to wit, on the 1st day of February, 1908, and subsequent to the date of the selection and allotment of the land therein conveyed, the said Jess Fulsom, by proper warranty deed, conveyed to the plaintiffs herein, C. S. Wortman, and R. W. Canfield, the land in controversy herein, to wit, the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 26, township 20, range 18, and that said grantees now hold and claim title under said deed as aforesaid. It is further agreed that in case plaintiffs herein are entitled to a judgment for \$50 as the reasonable value of the land in controversy for the year 1908 and up to this time," etc.

At the time the deed of January 27, 1905, was executed by said Fulsom to the defendant, he had not selected said lands as a part of his allotment.

The sole question for determination in this case, under the record, is whether said Fulsom could execute a valid conveyance to his surplus allotment prior to the time of his selection of the same. In *Goat et al. v. United States*, 224 U. S. 458, 32 Sup. Ct. 544, 56 L. Ed. 841, it is said:

"The inalienability of the allotted lands was not due to the quality of the interest of the allottee, but to the express restriction imposed. Their equitable interest was one which, in the absence of restriction, they could convey. * * *

In *Mullen et al. v. United States*, 224 U. S. 457, 32 Sup. Ct. 498, 56 L. Ed. 834, it is said:

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"There being no restriction upon the right of alienation, the heirs in the cases involved in this appeal were entitled to make the conveyances. * * *

Under the authority of said cases, after land has been allotted to members of the Five Civilized Tribes by the United States government, unless some restriction has been imposed against alienation, such land then becomes alienable. Act Cong. April 21, 1904, c. 1402, 33 St. at L. pp. 189, 204, entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian Tribes for the fiscal year ending June thirtieth, nineteen hundred and five, and for other purposes," provides:

"And all restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe."

The allotment having been selected, the fact that no patent had issued did not prevent the conveyance of the allottee's equitable estate therein. *Goat et al. v. United States, supra*; *Godfrey v. Iowa Land & Trust Co.*, 21 Okla. 293, 95 Pac. 792; *McWilliams Inv. Co. v. Livingston et al.*, 22 Okla. 884, 98 Pac. 914. But, when the first deed was executed by the said Fulsom, he was not an allottee, not having selected his allotment, and therefore had no equitable estate which he could then convey. *Goat et al. v. United States, supra*; *McKee v. Henry*, 201 Fed. 74. At that time such land was a part of the public domain of the Cherokee Nation, and he was not permitted to convey any part thereof. *Gritts v. Fisher*, 224 U. S. 640, 32 Sup. Ct. 580, 56 L. Ed. 928; *Stephens v. Cherokee Nation*, 174 U. S. 445, 19 Sup. Ct. 722, 43 L. Ed. 1041. Section 11 of the Cherokee Agreement (Act of July 1, 1902, c. 1375, 32 St. at L. 717) provides that:

"There shall be allotted by the Commission to the Five Civilized Tribes, and to each citizen of the Cherokee Tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value

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to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements."

In *McLaughlin v. Ardmore Loan & Trust Co.*, 21 Okla. 173, 95 Pac. 779, section 2118 of the Revised Statutes of the United States, which is as follows, is applied:

"Every person who makes a settlement on any lands belonging, secured or granted by treaty with the United States to any Indian tribe, or surveys or attempts to survey such lands, or to designate any of the boundaries by marking trees, or otherwise, is liable to a penalty of one thousand dollars. The President may, moreover, take measures and employ such military force as (he) may judge necessary to remove any such person from the lands."

In that case the plaintiff in error, a member of the Choctaw Tribe of Indians, holding possession of lands in excess of that permitted by section 16, c. 1366, Act Cong. July 1, 1902, 32 St. at L. 643, sold such excessive holding to a person not a member of said tribe. In the opinion it is said that, as the contract of sale "had for its object the violation of law, it is illegal and cannot be enforced." The same holding was made in *Combs et al. v. Miller*, 24 Okla. 576, 103 Pac. 590. See, also, *Howard et al. v. Farrar*, 28 Okla. 490, 114 Pac. 695.

The Cherokee Agreement (Act Cong. July 1, 1902, 32 St. at L. 716, c. 1375) provides:

"Sec. 14. Lands allotted to citizens shall not in any manner whatever or at any time be incumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this act. * * *

"Sec. 15. All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent. * * *

"Sec. 18. It shall be unlawful after ninety days after the ratification of this act by the Cherokees for any member of the Cherokee Tribe to inclose or hold possession of, in any manner, by himself or through another, directly or indirectly, more lands in value than that of one hundred and ten acres of average al-

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lottable lands of the Cherokee Nation, either for himself or for his wife, or for each of his minor children, if members of said tribe; and any member of said tribe found in such possession of lands, or having the same in any manner inclosed, after the expiration of ninety days after the date of the ratification of this act shall be deemed guilty of a misdemeanor."

Said sections 14 and 15 were construed by this court in *Allen v. Oliver*, 31 Okla. 356, 121 Pac. 226, wherein it was held that:

"Under sections 14 and 15 of the Cherokee Agreement, approved July 1, 1902 (Act July 1, 1902, c. 1375, 32 St. at L. 717), all lands allotted to members of the said tribe, except homesteads, were alienable in five years after issuance of patent, and not prior thereto."

This holding by this court was approved by the Eighth Circuit Court of Appeals in *Trusket et al. v. Closser* (C. C. A.) 198 Fed. 835. Not only were noncitizens and corporations prohibited by said section 2118 of the Revised Statutes of the United States from making a settlement on any lands belonging to the Cherokee Tribe or from surveying or attempting to survey such lands or designating any of the boundaries by marking trees or otherwise, independent of the performance of official duties under direction of the United States government or tribal government, but also after the passage of act July 1, 1902, c. 1375, 32 St. at L. p. 716, and the expiration of 90 days from said date, it was not permissible for any member of the Cherokee Tribe to inclose or hold possession of, in any manner, by himself, or through another, directly or indirectly, more lands in value than that of 110 acres of average allottable lands of the Cherokee Nation, either for himself or his wife, or for each of his minor children, if members of said tribe; and any member of said tribe found in such possession of lands, or having the same in any manner inclosed, after the expiration of 90 days after the date of ratification of said act, was to be deemed guilty of a misdemeanor.

Obviously Jess Fulsom, a Cherokee freedman, to whom the land in controversy was allotted, had no authority to alienate said land, except by virtue of said act April 21, 1904, removing the restrictions upon the alienation of the lands of all allottees of either of the Five Civilized Tribes, who are not of Indian blood,

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except minors and except as to homesteads. The limitation or prohibition under said section 14 is that lands allotted to citizens shall not be alienated by the allottee or his heirs, and under said section 15 the grant, which also operated as a limitation or restriction against alienation to such date, is that lands allotted to members of said tribe shall be alienable in five years after issuance of patent. The restriction removal provision of act April 21, 1904, c. 1402, 33 St. at L. 189, harmonizes with said sections 14 and 15, as restrictions upon the alienation of the lands of allottees of the Five Civilized Tribes, who are not of Indian blood, except minors and as to homesteads, are removed. Prior to April 21, 1904, the lands of the Cherokee Nation were absolutely inalienable until allotted to members of said tribe. Said act of April 21, 1904, sought to take off this restriction as to certain lands of *allottees*, not to remove restrictions upon the distributive share of any members of the tribe prior to allotment. The restriction which had been imposed upon the allottees by said sections 14 and 15 was only in part removed. Such parties became allottees only after the land had been allotted to them.

In *McKee v. Henry*, 201 Fed. 74, decided by the United States Circuit Court of Appeals, Eighth Circuit, at its September, 1912, term, that court said:

"The Muskogee or Creek Tribe was in the nature of a dependent nation, and, as our national public buildings belong to the nation, the citizen, while he has an interest in them has no share in the title to them, so these lands, so far as the Indian title was concerned, belonged to the tribe as a community, and no separate Indian had any title whatever severally or as a tenant in common. No law or agreement to divide the lands in severalty had any effect to create such a title until the lands were actually allotted. All these laws contemplated that the tribe, through its members, would receive substantially the whole reservation in lands or money. If the right to lands was vested after enrollment, and before allotment, then why was the interest of the Indians not actually vested in the remaining lands and money? Yet it was expressly held in *Gritts v. Fisher*, 224 U. S. 640 [32 Sup Ct. 580, 56 L. Ed. 928], that the interest in the remaining lands and money was not vested, and that new participants could be added by Congress. The enrolling primarily established the right of citizenship, and only incidentally conferred the right to

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allotment, and, until allotment was made, no inheritable right vested in the individual Indian. * * *

In the opinion it is further said:

"When the allotment was made, for the first time the rights of any individual vested, and the title became vested in the one at that time fixed by the law, and it makes no difference what previous laws may have provided."

If no such interest had vested that could be inherited until after the allotment, certainly no equitable title to the land in controversy vested until allotment. It was upon the theory that an equitable estate had vested before the issuance of patent that conveyances prior to the issuance of patent were sustained. *Goat et al. v. United States, supra*; *Godfrey v. Iowa Land & Trust Co., supra*; *McWilliams Inv. Co. v. Livingston et al., supra*. This holding confirms our construction of the provision from act April 21, 1904, above set out. If prior to allotment the members of the tribe had no such vested interest as could be inherited, obviously Congress did not remove the restrictions against alienation, so as to permit such member to alienate his land before it was allotted to him; for in the exercise of its guardianship over the Indians it was certainly the contemplation of the federal government that in the alienation of his land he should receive a consideration therefor commensurate with its reasonable value. If by removal of restrictions he were permitted to sell his prospective allotment when "it was a mere float—giving him the right to no specific property"—such a policy would not be conducive to bring about salutary results in favor of the member of the tribe, to the end that he should receive his equal share in the allotment of lands, and the same be alienated under conditions that would reasonably bring him a consideration commensurate to its reasonable value. *Gann v. Ball*, 26 Okla. 26, 110 Pac. 1067, is not in any event an authority against this conclusion, as the validity of the contract was not attempted to be raised, but treated by all parties to said litigation as valid. As to its validity no intimation is here made.

The title to the public domain or tribal lands of the Cherokee Nation was in the Cherokee Nation, and not in the individuals. *Godfrey v. Iowa Land & Trust Co., supra*; *Gritts v. Fisher*,

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supra; *Cherokee Trust Fund*, 117 U. S. 288, 6 Sup. Ct. 718, 29 L. Ed. 880; *Cherokee Nation v. Journeycake*, 155 U. S. 196, 15 Sup. Ct. 55, 39 L. Ed. 120.

Article 20 of the Treaty with the Cherokees of July 19, 1866 (14 St. at L. p. 799), provides:

"Whenever the Cherokee national council shall request it, the Secretary of the Interior shall cause the country reserved for the Cherokees to be surveyed and allotted among them, at the expense of the United States."

Section 706, art. 23, p. 351, Laws of the Cherokee Nation, provides:

"It shall not be lawful for any citizen of the Cherokee Nation to sell any farm, or other improvement in said nation, to any person other than a *bona fide* citizen thereof; nor shall it be lawful to rent any farm or other improvements in this nation to any person other than a citizen of the Indian Territory; and every person who shall offend herein shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall suffer punishment by fine, in any sum not less than ten dollars, nor exceeding five hundred dollars, or in default of payment, by imprisonment for any term not exceeding one year."

Said section of the Cherokee Laws was superseded by the Cherokee Agreement or Act Cong. July 1, 1902 (32 St. at L. 716), and section 18 of said agreement, when considered in connection with sections 14 and 15 thereof under the rule of construction, *expressio unius exclusio alterius*, has the effect of confining members of the Cherokee Nation to the possession of land not exceeding that of 110 acres of average allottable lands of the Cherokee Nation, either for himself or for his wife or for each of his minor children that are members of said tribe. Following up this rule of construction, it would follow that said sections had the effect of prohibiting such members from selling any part of the public domain. From the treaties between Congress and the Cherokee Tribe and the legislation enacted by Congress affecting the Cherokee Nation, in the light of the tribal laws herein set out, it is obvious that it was the intention of Congress that members of said tribe should not convey any interest in the public domain and that such conveyance when made is void as against public policy.

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Section 642, c. 27, Mansf. Dig. of Ark. (1884), provides:

"If any person shall convey any real estate by deed, purporting to convey the same in fee simple absolute, or any less estate, and shall not at the time of such conveyance have the legal estate in such lands, but shall afterward acquire the same, the legal or equitable estate afterward acquired shall immediately pass to the grantee, and such conveyance shall be as valid as if such legal or equitable estate had been in the grantor at the time of the conveyance."

Said section of the Statutes of Arkansas was extended in force in the Indian Territory on February 19, 1903. Act April 28, 1904, c. 1824, 33 St. at L. 573; 10 Fed. St. Ann. 138. Section 642 merely announces by statute the general rules of estoppel.

"Where a grantor conveys land with warranty in which he has nothing at the time, he is not only estopped from claiming in opposition to his deed, but the estate which subsequently vests in him is bound by the estoppel and is transferred by the operation of the estoppel to the grantee." (2 Herman on Estoppel and Res Judicata, sec. 658, p. 793.)

Said Fulsom not being an allottee at the time he executed the first deed, to wit, the one of January 27, 1908, section 642 does not apply to him as to said deed. Said section 642 was intended to apply to conveyances where the land covered by such conveyance was subject to be conveyed, but where the grantor had not the title vested in him according to his covenant. Said land prior to the time of its being selected by Fulsom as a part of his allotment being a part of the public domain of the Cherokee Nation, though he was a member of said tribe, he could not execute any lawful conveyance thereto, as such conveyance was void (1) on the ground that restrictions had not been removed as to such land, and (2) further because it was against public policy for him to execute a conveyance to a part of the public domain of said nation. The rule of estoppel as declared by said section 642 has no application to conveyances executed in the face of the law. Such conveyance being void when executed, said section 642 was not intended to breathe life into it.

The question of a constructive allotment or where the party had done everything reasonably within his power to select

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his allotment by making application, etc., but being wrongfully refused, etc., is not in this case. As to such possible exceptions we express no opinion.

This holding does not affect the owner of the improvements upon town lots in the town sites of the Five Civilized Tribes. Act May 31, 1900, c. 598, 31 St. at L. 221; act July 1, 1902, c. 1361, sec. 45, 32 St. at L. 652. There the town-site commissioners were required to survey and lay out the town sites, and prepare correct plats thereof, one to be filed with the Secretary of the Interior, one with the clerk of the United States Court, one with the authorities of the tribes, and one with the town authorities. All town lots were to be appraised by said commission, and then the owner of the improvements was to deposit in the United States treasury at St. Louis, Mo., one-half of said appraised value as follows: Ten per cent. within two months; 15 per cent. within six months; and the remainder in three equal annual installments thereafter. The Supplemental Chickasaw and Choctaw Treaty (32 St. at L. 641) in certain instances provided for the payment of all the appraisement by the owner of the improvements, but did not change the manner. No provision of the town-site laws prevented the owner of the improvements on such lot, after the same was appraised and he had made the first payment, from conveying or contracting for sale of the lot or his equity therein, and under such event said section 642 would apply. *Goat et al. v. United States, supra.*

The question of the adverse holding of the defendant at the time of the execution of the deed to plaintiffs, not being raised, is not passed on. *Martin v. Cox et al.*, 31 Okla. 543, 122 Pac. 511; *Miller v. Fryer, ante*, 128 Pac. 713.

The judgment of the lower court is affirmed.

All the Justices concur.

Walter Realty Co. v. Jones.

WALTER REALTY CO. v. JONES.

No. 2075. Opinion Filed January 7, 1913.

(129 Pac. 840.)

1. **PUBLIC LANDS—Town Sites—Rights of Prior Occupant.** When a town site is entered by the probate judge under sections 2387 and 2388, Revised Statutes (U. S. Comp. St. 1901, pp. 1457, 1458), and the town-site laws of the state of Kansas extended to and put in force in Oklahoma by the act of March 3, 1891 (26 St. at L. 1026, c. 543 [U. S. Comp. St. 1901, p. 1617]), he takes the title in trust for the benefit of the occupants; and when a lot is continuously in the actual possession and occupancy of one party, who is shown to be a prior settler thereon, he is not deprived of his right thereto by an award of the town-site commissioners and a subsequent deed from the probate judge to another party.
2. **SAME—Findings of Commissioners—Review.** The town-site commissioners appointed by the probate judge are not judicial officers, and their findings are not conclusive, but only advisory; and a court may, on a proper showing, re-examine the questions passed on by them.

(Syllabus by the Court.)

Error from District Court, Comanche County;
J. T. Johnson, Judge.

Action by the Walter Realty Company against N. Jones. Judgment for defendant, and plaintiff brings error. Affirmed.

Stevens & Myers and T. B. Orr, for plaintiff in error.

Hussey & Japp and Hudson & Whalin, for defendant in error.

KANE, J. This was an action, commenced by the plaintiff in error, plaintiff below, against the defendant in error, defendant below, to recover possession and quiet title to certain lots in the town of Walter. Upon trial there was a verdict for the defendant, upon which judgment was duly rendered, to reverse which this proceeding in error was commenced.

The town site of Walter was proved up under sections 2387 and 2388, Rev. Laws of the United States, and the town-site laws of the state of Kansas extended to and put in force in the

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territory of Oklahoma by the act of Congress of March 3, 1891 (26 St. at L. 1026, c. 543 [U. S. Comp. St. 1901, p. 1617]). The findings of the jury are to the effect that on the day of the opening the defendant settled upon the lots in controversy and made improvements thereon, and claimed them as his own; that one Crawford, through whom the plaintiff claimed title, and to whom the town-site commissioners awarded the certificate and the probate judge issued a deed, did not enter upon the lots until one day after defendant had occupied and made settlement thereon. As there was sufficient evidence to support the findings of the jury, the verdict and judgment based thereon cannot be disturbed. If, as the jury found, the defendant was an occupant of the lots in controversy at the time the town site was entered, and made settlement and improvements thereon, and his occupancy was prior to his adversary's, and he complied with all the proper rules and regulations of the probate judge and town-site commissioners pertaining to proving up of such town site, the deed ought to have been issued to him, instead of to Crawford, the grantor of the plaintiff. *Winfield Townsite Co. v. Maris*, 11 Kan. 128.

It is well settled that when a town site is entered by the probate judge under sections 2387 and 2388, Revised Statutes of the United States (U. S. Comp. St. 1901, pp. 1457, 1458), and the town-site laws of the state of Kansas extended to and put in force in Oklahoma by the act of March 3, 1891 (26 St. at L. 1026), he takes the title in trust for the benefit of the occupants; and when a lot is continuously in the actual possession and occupancy of one party, who is shown to be a prior settler thereon, he is not deprived of his right thereto by an award of the town-site commissioners and a subsequent deed from the probate judge to another party. *Rathbone v. Sterling*, 25 Kan. 444.

The case of *King v. Thompson*, 3 Okla. 644, 39 Pac. 466, is cited by counsel for plaintiff in error to support his contention that the court had no jurisdiction collaterally to review any question decided by the town-site commission appointed by the probate judge. That case, however, is not in point, for the reason that it involves the power of a court of equity to review the de-

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cisions of a town-site board appointed by the Secretary of the Interior, under a different statute, which provided for appeals from the action of the town-site board to the Commissioner of the General Land Office, and thence to the Secretary of the Interior. It has been held by the Supreme Court of the territory of Oklahoma that the town-site commissioners appointed by the probate judge under the town-site laws of the state of Kansas are not judicial officers, and their findings are not conclusive, but only advisory; and a court may, on a proper showing, re-examine the questions passed on by them. *Downman et al. v. Saunders*, 3 Okla. 227, 41 Pac. 104.

Mr. Justice Bierer, who delivered the opinion of the court in the Downman case, says:

"Under the law regulating the administration of the trust, where lands are entered by the probate judge, for the use and benefit of the occupants of such land, as a town site in this territory, as adopted by Congress from the state of Kansas, the commissioners appointed by the probate judge to set off lots to occupants of a town site are not a judicial tribunal, and their award is not a judicial determination; and it is unnecessary, in the petition of one who seeks to recover lots by virtue of occupancy as against one who holds the deed from the probate judge, to allege fraud in the making of such award, in order to state a cause in his petition."

In support of this proposition *Rathbone v. Sterling*, 25 Kan. 444, *Brown v. Parker*, 2 Okla. 258, 39 Pac. 567, and *Biddick v. Kobler*, 110 Cal. 191, 42 Pac. 578, are cited.

Finding no error in the record, the judgment of the court below is affirmed.

TURNER, C. J., and HAYES and WILLIAMS, JJ., concur; DUNN, J., absent, and not participating.

Horton v. Birdsong.

HORTON v. BIRDSONG.

No. 2099. Opinion Filed January 7, 1913.

(129 Pac. 701.)

BILLS AND NOTES—Conditional Delivery. A promissory note may be delivered conditionally, and this may be accomplished by delivery to the payee himself, with proper instructions in relation to the condition.

(Syllabus by the Court.)

*Error from Oklahoma County Court;
Sam Hooker, Judge.*

Action by J. W. Birdsong against S. A. Horton. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions.

Roy F. Ford, for plaintiff in error.

Snyder, Owen & Lybrand, for defendant in error.

KANE, J. This was an action upon a promissory note, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below. Upon trial there was judgment for the plaintiff, to reverse which this proceeding in error was commenced.

The uncontradicted evidence shows that the note was executed by the maker at Oklahoma City, and forwarded to the payee at Greenville, Tex., by mail; that accompanying the note was a bill of sale, as follows:

"I hereby, for valuable consideration, transfer to S. A. Horton all my right, title and interest that I have in the Queen City Oil & Mining Company, and the Oklahoma City Oil Company by reason of investments made for me by said Horton, the consideration being the repayment to me the amount expended for me as evidenced by his promissory note of November 18, 1905, which said note and promise to pay shall constitute a complete settlement between the said Horton and myself."

Written across the back of the letter forwarded with the bill of sale was the following:

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"Sign the transfer I inclose; this will let you out. Since I have to pay my obligations, I am going to insist that the well be finished and believe that I will come out all right; yet, in the present shape we will likely have considerable trouble before we get it wound up."

In answer to the question, "Did you offer to deliver the bill of sale, properly signed, before the note became due?" Mr. Birdsong replied, "I did not." A great portion of the evidence taken at the trial relates to a certain business transaction between the plaintiff and defendant, which transaction led up to and culminated in the execution of the note, but, as this is an action upon the note, we do not consider any of that evidence material. It seems too clear for controversy that the note delivered was upon the express condition that the payee should sign and return the bill of sale which accompanied it before the note became effective as such, and that his failure to do so constituted a valid defense to an action upon the note.

It is a settled principle of law that a promissory note may be delivered by the maker to the payee upon condition. *Tovera v. Parker et al.*, ante, 128 Pac. 101. The general rule is stated in 4 Am. & Eng. Enc. of Law, p. 204, as follows:

"Bills and notes may be delivered to take effect not at all events, but conditionally upon the happening of a future contingency, and this may be accomplished either by a formal delivery in escrow into the hands of a third person for the promisee, or by delivery to the promisee himself in the nature of an escrow, the intervention of a third person not being absolutely necessary, according to the better doctrine, to make the transfer in effect conditional."

As the note in controversy was delivered to the payee upon condition that he sign the bill of sale accompanying it and return the same to the maker of the note, and the condition was not complied with, it follows that it was error for the court to enter judgment upon the note against the defendant.

The judgment is therefore reversed, and the cause remanded, with directions to proceed in accordance with this opinion.

TURNER, C. J., and HAYES and WILLIAMS, JJ., concur; DUNN, J., absent, and not participating.

League v. Town of Taloga.

LEAGUE v. TOWN OF TALOGA.

No. 2123. Opinion Filed January 7, 1913.

(129 Pac. 702.)

1. **PUBLIC LANDS—Town Sites—Reservation for County Seats.** The devolution of title to lots on town sites in the Cheyenne and Arapaho country reserved for county-seat purposes by the Secretary of the Interior is governed by sections 2387 and 2388, Revised Statutes of the United States (U. S. Comp. St. 1901, pp. 1457, 1458), and the town-site laws of the state of Kansas, as modified by the act of Congress of March 3, 1891, c. 543, sec. 17, 26 St. at L. 1026.
2. **STATUTES—Interpretation—Construction by Officers.** The construction placed on statutes or constitutional provisions by officers in the discharge of their duties, either at or near the time of the enactment, which has been long acquiesced in, is a just medium for its judicial interpretation.
3. **PUBLIC LANDS—Town Sites—Reservation for Municipal Purposes.** The authority to reserve not to exceed one-half section of land in each county in the Cheyenne and Arapaho country for county-seat purposes, conferred upon the Secretary of the Interior by section 17 of the act of March 3, 1891, c. 543, 26 St. at L. 1026, embraced the power to set aside for public purposes such lots or parcels of ground situated upon such town site as, in the judgment of the Secretary, would be necessary for the municipal needs and conveniences of a county-seat town.

(Syllabus by the Court.)

Error from District Court, Dewey County;
G. A. Brown, Judge.

Action by the Town of Taloga against Mary E. League. Judgment for plaintiff, and defendant brings error. Affirmed.

J. R. League, for plaintiff in error.

Adams & Smith, for defendant in error.

KANE, J. This was a suit in equity commenced by the town of Taloga, defendant in error, plaintiff below, against the plaintiff in error, defendant below, for the purpose of declaring a resulting trust. The lots in controversy are part of the government town site of Taloga, which town site was reserved for

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county-seat purposes by the Secretary of the Interior, in pursuance of the act of Congress of March 3, 1891, which, among other things, provided for the opening to settlement of the Cheyenne and Arapaho country. The court below granted the relief prayed for, to reverse which action this proceeding in error was commenced.

It seems that the Secretary of the Interior, in carrying out the duty cast upon him by the foregoing act of Congress, caused the tract of land reserved for county-seat purposes to be surveyed and platted into streets, alleys, and lots; that by this plat various lots or parcels of ground were shown to be reserved for public uses by marking upon such tracts, as they appeared upon the plat, the purpose for which the reservations were intended. Thus the lot in controversy was marked "Town Bldg." Other tracts were marked "For Parks," etc. This plat, after being approved by the Governor of the territory, was attached to the town site application for entry and filed with the Register of the General Land Office, who thereafter caused a copy thereof to be filed in the office of the register of deeds of the county of which the town site became the county seat. Upon the opening of the town site, notices were placed upon the lots thus reserved to accord with the markings on the plat, stating the purpose of reservation, and the soldiers and other agents of the United States government in charge of the opening directed attention to these notices, and required all prospective settlers to respect the reservations so made. This was the universal practice throughout the Cheyenne and Arapaho country. After the entry of the town site under sections 2387 and 2388 of the Revised Statutes of the United States (U. S. Comp. St. 1901, pp. 1457, 1458), as required by the above act, the town-site commissioners, appointed by the probate judge in accordance with the town-site laws of the state of Kansas, which by the same act were extended to and put in force in the territory of Oklahoma, resurveyed and replatted the town site, making their plat conform to the original plat heretofore mentioned. On the plat prepared by the commissioners the lot in controversy was also marked "Town Bldg." The proceedings of the commissioners, returned to the

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probate judge, show the lot was reserved for public purposes. In this particular case the evidence discloses that on the day of the opening the lot itself was properly marked, according to the usual custom, and that the soldiers in charge of the opening called attention to the fact that it was reserved, and prevented prospective settlers from occupying it or any of the other lots reserved for public purposes. The first probate judge of Dewey county, of which Taloga was and is the county seat, did not execute a deed to the lot in controversy, and thus matters stood for several years, when a subsequent probate judge, finding the lot still vacant and unoccupied, executed a deed thereto to the grantors of the plaintiff in error herein.

The contention of plaintiff in error is that the attempted reservation is absolutely void and of no force and effect, for the reason that the patent issued by the United States conveyed title to the entire town site to the probate judge, "in trust for the several use and benefit of the occupants" thereof, and that neither the Secretary of the Interior nor the town-site commissioners had any authority to set apart any part thereof for public use. This contention is based upon the theory that sections 2387 and 2388 of the Revised Statutes of the United States and the town-site laws of the state of Kansas passed in pursuance thereof governed the devolution of the lots embraced within the town site, and that that law contemplates that the entire town site shall be held in trust for the occupants. We think counsel are slightly in error in this. The Kansas town-site law was enacted in pursuance of that part of section 2387 of the Revised Statutes of the United States, *supra*, which provides that the disposal of lots situated upon a town site and the proceeds of sales thereof shall "be conducted under such regulations as may be prescribed by the legislative authority of the state or territory in which the same may be situated," for the purpose of vitalizing the act of Congress. The act of Congress itself was passed, as the title indicates, for the relief of the inhabitants of cities and towns upon public lands. At the time of its passage a great many cities and towns of considerable population, some of which had been incorporated, had sprung up upon the public

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domain by mere act of settlement and improvement, and it required action by Congress to enable the inhabitants to acquire title to the lands occupied by them from the United States. In Oklahoma conditions were materially different. Here there were large areas of unoccupied government land which the government desired to open to settlement. The act of Congress of March 3, 1891, *supra*, which was enacted for that purpose, provides, before any such lands in Oklahoma are opened to settlement:

"It shall be the duty of the Secretary of the Interior to divide the same into counties, which shall contain as near as possible not less than nine hundred square miles in each county. In establishing said county lines, the Secretary is hereby authorized to extend the lines of the counties already located so as to make the areas of said counties equal, as near as may be, to the areas of the counties provided for in this act. At the first election for county officers the people of each county may vote for a name for each county, and the name which receives the greatest number of votes shall be the name for each county: Provided, further, that as soon as the county lines be designated by the Secretary, he shall reserve not to exceed one-half section of land in each county, to be located near the center of said county, for county-seat purposes to be entered under sections twenty-three hundred and eighty-seven and twenty-three hundred and eighty-eight of the Revised Statutes; Provided, that in addition to the jurisdiction granted to the probate courts and the judges thereof in Oklahoma Territory by legislative enactments, which enactments are hereby ratified, the probate judges of said territory are hereby granted such jurisdiction in town-site matters and under such regulations as are provided by the laws of Kansas."

This section must be construed in connection with sections 2387 and 2388 of the Revised Statutes, and the town-site laws of the state of Kansas, and the whole applied to the changed conditions created by the last act.

It will be noticed that by the act of March 3, 1891, *supra*, the reservation which the Secretary of the Interior is authorized to make is primarily for county-seat purposes, and that the Secretary was required to reserve the land as soon as the county lines were designated, which, in every instance, was prior to the time there could be any occupants or settlers upon the town

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site. This was clearly a modification of the former town-site laws. Congress, recognizing the necessity for county seats in the new counties about to be created in a new country entirely devoid of cities, towns, or villages, made provision for that emergency; and, in our judgment, it would be repugnant to reason to hold that, notwithstanding the reservation for county-seat purposes by the Secretary of the Interior pursuant to the last act, the patent thereafter issued to the probate judge conveyed the title to the entire tract to the probate judge, in trust for the several use and benefit of the occupants of the town site. Effect must be given to the part of the act of March 3, 1891, *supra*, which provides for the reservation of land for county-seat purposes. The Secretary of the Interior evidently considered that the direction to him to reserve a tract of land, to be located near the center of the county, for county-seat purposes embraced the power to segregate from settlement such lots or parcels of ground as, in his judgment, would be necessary for the municipal needs and conveniences of a county-seat town, and that the balance of the tract should be distributed to such persons as desired to settle upon and improve the same under the town-site laws. At least, that is what he did in the instant case, and the same practice was followed in all the county-seat town sites in the Cheyenne and Arapaho country; and upon the opening the people who sought to acquire lots upon these town sites, in the main, respected the reservations for public purposes made by the Secretary, or were required to do so by the soldiers and others in charge of the openings. The Governor of the territory, the probate judge, and the commissioners appointed by him did the same; and it was not until long after these town sites were opened to settlement, proved up, and deeds made, in most instances, conveying the title to the segregated lots according to their designation by the Secretary and town-site authorities, that any one claimed a right to acquire title thereto based upon the invalidity of the original reservation. We are not aware of any such attempt being made where the deeds were actually executed by the probate judge, or by persons who claimed a right to the premises by occupancy and improvement. It is only in a few cases,

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like the one at bar, that a small number of persons, not original occupants, finding that the deeds had not been executed, and that the lots remained vacant and unoccupied by the municipality, sought to acquire title themselves by applying to subsequent probate judges for same.

Not being entitled to the lots as occupants of the town site at the time it was entered (*Winfield T. Co. v. Maris*, 11 Kan. 128), they do not base their right to a deed upon the strength of their own title, but upon the weakness of their opponents. We do not believe that that class of persons should be permitted to disturb a condition which has been generally looked upon as settled for a great number of years, and under which valuable property rights have arisen. Many of the lots set aside have been long used for the public purposes for which they were variously designated, and permanent and valuable improvements have been placed thereon. The practical construction placed upon the acts under discussion by the Secretary of the Interior, the Governor of the territory, and the town-site commissioners who were immediately charged with their execution, has remained unquestioned for a long period of time, and, as it seems reasonable and just to us, we are constrained to adopt it. The construction placed on statutes or constitutional provisions by officers in the discharge of their duties, either at or near the time of the enactment, which has been long acquiesced in, is a just medium for its judicial interpretation. *Hoffman v. County Com'rs*, 3 Okla. 325, 41 Pac. 566; *Higgins v. Brown*, 20 Okla. 355, 94 Pac. 703; *State v. Hooker*, 26 Okla. 460, 109 Pac. 527.

Finding no error in the record, the judgment of the court below must be affirmed.

TURNER, C. J., and HAYES and WILLIAMS, JJ., concur; DUNN, J., absent, and not participating.

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MOREN v. NICHOLS *et al.*, County Election Board.

No. 4616. Opinion Filed January 7, 1913.

(129 Pac. 741.)

1. **ELECTIONS—Canvassing Boards—Correction of Errors.** Where the only defect in the returns from an election precinct to the county canvassing board is that the certificates showing the number of votes cast for the various persons voted for were not authenticated by the signatures of two of the four counters at the election in said precinct, as required by section 7, c. 106, Sess. Laws 1911, and where, before the county canvassing board had completed the canvass of the returns, all the election officers of said precinct appeared before the county board and offered to correct the errors in said returns by authenticating the same with the signatures of said two counters who had omitted to sign same, it was the duty of the board of county canvassers to permit such correction and to canvass the returns from said precinct; and, upon failure or refusal to do so, the board of county canvassers may be compelled to permit such correction, or treat the returns as if corrected, and canvass same.
2. **SAME—County Election Board—Opening Returns.** By reason of section 8, c. 106, Sess. Laws 1911, the county election board as the county board of canvassers is under no duty, and is without authority, to open the envelope returned by the election officers of any precinct containing the voted ballots and tally sheets, labeled as by the statute required, to wit, "Voted Ballots," "Tally Sheets," and "Stub Book of Ballots," in order to search for the certificate of returns which should have been inclosed in a separate envelope, labeled "Returns," in order that the returns from said precinct may be canvassed.

(Syllabus by the Court.)

Error from District Court, Cherokee County;
John H. Pitchford, Judge.

Mandamus by Joe Moren against Virgil Nichols and others, constituting the Election Board of Cherokee County. Decree for defendants, and petitioner brings error. Reversed and remanded.

Bruce L. Keenan and M. C. Reville, for plaintiff in error.

Houston B. Tehee and E. C. McMichael, for defendants in error.

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HAYES, J. The facts in this case appear from the pleadings and by stipulation upon which the case was tried in the lower court. Plaintiff in error, who brought this proceeding in the court below for mandamus, and one J. F. Musgrave, were rival candidates at the general election held on the 5th day of November, 1912, for the office of county commissioner of the First commissioner's district of Cherokee county. By a canvass of part of the returns from the different election precincts of the commissioner's district the county election board ascertained that Musgrave had received 307 votes, and plaintiff in error 302 votes. The county election board, however, refused to canvass the returns from Hulbert precinct No. 1, because the certificate to said purported returns had been signed by only two of the counters of said precinct. They also refused to canvass and count the votes as returned from Hulbert precinct No. 2 and Moody precincts Nos. 1 and 2, for the reason that said returns were sealed up in the envelope labeled "Voted Ballots," "Tally Sheets," and "Stub Book of Ballots." If the votes from the several precincts, the returns from which were not canvassed by the county election board, are canvassed and counted, the result of the election will be changed. This action was commenced by plaintiff in error to secure mandamus to compel the county election board to recanvass the votes from the various election precincts of the district, including those precincts not heretofore canvassed by the board, and to issue certificate to the successful candidate in accordance with the result of the election ascertained thereby. At the time the action was instituted in the court below, the county election board was then in session, engaged in canvassing the returns of the votes for county and state officers from the various precincts of the county. During the time the vote from the different precincts of the commissioner's district here involved was being canvassed, the election officials of Hulbert precinct No. 1 appeared before the county election board, and asked permission to correct the irregularly executed certificate to the returns made by the precinct election officers by attaching thereto the signature of the other two counters, and by swearing to same before the precinct election in-

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spector. This the county election board refused to permit the precinct election officers to do, and in their canvass rejected the returns from this precinct.

By section 7, c. 106, Sess. Laws 1911, it is provided that, when the count at any election precinct is completed, the two tally sheets shall be signed by the four counters, and the four counters shall then fill out the certificate in the back of the book of the ballots without detaching it from said book, and also shall make out at least four duplicates thereof. Such certificate shall have only the total of each candidate's votes, and shall be signed by each of the four counters, and be sworn to before the inspector of elections. One such certificate is required to be kept by the inspector of the election and the other two constitute the returns, and, "when properly certified to, shall be *prima facie* evidence of the correctness of the precinct vote." By section 8 of the same act the two duplicate copies of the certificate are required to be placed into an envelope labeled "Returns," and returned to the county election board, which the county election board shall open and canvass.

It was the duty of the canvassing board to examine the returns and ascertain whether the certificate had been executed by the officers as provided by law, and whether the purported returns were in fact genuine and sufficient for the purpose of their action. *State ex rel. Montgomery et al. v. State Election Board*, 29 Okla. 31, 116 Pac. 168. When they found that such certificate had not been executed by the counters as required by law, they violated no duty in refusing to canvass the returns in that condition; and, had they completed their canvass of all the other returns from the district, ascertained the result thereof, issued the certificate of election and adjourned, without the occurrence of the other events we shall subsequently advert to, they would have fully discharged their duty, and a writ of mandamus would not lie to compel them to reassemble and to canvass a new set of returns, or returns whose irregularities had been corrected. *Roberts et al. v. Marshall et al.*, 33 Okla. 716, 127 Pac. 703. But, before they completed the canvass, the precinct officers offered to correct the irregularities in the certificates which re

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sulted from the negligent omission of two of the counters to sign same, and not from any fraud or misconduct on the part of any one. The regularity of the returns otherwise is not questioned; nor was it proposed in any manner to change same, other than to perform by the two counters the omitted act required by law, so the returns might be canvassed. Had the counters arbitrarily or negligently refused to sign the certificates before the returns were made to the county canvassing board, and an action for that purpose had been brought, they could have been compelled to do so by mandamus. They cannot by a negligent or willful failure to perform a plain ministerial duty block the operation of the law. If the precinct officers could have been compelled to perform the omitted duty, they should not, in the absence of fraud, be refused permission to perform it voluntarily; and a narrow and technical rule that would defeat the performance of an omitted duty by these officers that can affect unjustly no one should not be adopted, but one that will effectuate the will of the people as expressed at the election and the fulfillment of the purposes of the statute without needless litigation. We are of the opinion that it was the duty of the county election board to permit the precinct counters to correct the certificate by signing same; and that it is competent for the court to order them by mandamus to do so, although they have canvassed all the other returns and issued a certificate to the prevailing candidate as disclosed by the returns canvassed. The board, not having fully and completely discharged the duty under the statute at the time the purported canvass was made, may be compelled to reconvene and recanvass and correct the mistake it has made. *Stearns et al. v. State ex rel. Biggers et al.*, 23 Okla. 462, 100 Pac. 909. In the view that the precinct officers should have been permitted to correct these returns we are supported by the following authorities in point: *Rummel v. Dealy et al.*, 112 Iowa, 503, 84 N. W. 526; *People ex rel. v. Nordheim et al.*, 99 Ill. 553; *Bates v. Crumbaugh*, 114 Ky. 447, 71 S. W. 75, 24 Ky. Law Rep. 1205.

In *People ex rel. v. Nordheim et al.*, *supra*, upon a very similar state of facts, the court said:

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"That the offer by the officers to sign the returns after it was discovered that they had omitted to sign them, and after the returns had been sent to the proper authorities, was sufficient to treat the returns as if they were in fact signed, and they should have been so treated."

It follows from this conclusion that the county election board should be ordered in this proceeding to reconvene, if they have adjourned, permit the election officers of the precinct to correct the certificate to the returns from said precinct, or to treat said returns as if corrected, and to consider them in their canvass of the returns from said commissioner's district.

The statute requires that as the ballots are counted by the election officers they shall be strung upon a string, and when the canvass is completed, the string shall be tied and the knot sealed. Section 8 of the act of 1911, above referred to, provides that, when the ballots are thus tied and the knot sealed, they and the stub ballot books with all the untouched ballots attached to the stubs and the original certificate in the back thereof, and the two tally sheets, shall be placed in an envelope, labeled "Voted Ballots," "Tally Sheets," and "Stub Books of Ballots," and provides that "this envelope shall not be opened except upon order of the Supreme Court or district court or a judge thereof, in case of contest or some legal proceeding, necessitating the opening of the same." This envelope, together with the envelope labeled "Returns," which should contain the two duplicate copies of the certificate, after having been sealed, are required to be placed by the precinct election officers into the ballot box and the box to be securely locked, which shall not again be opened, but shall be delivered in that condition to the secretary of the county election board. "The county election board shall not disturb anything in the ballot box except the envelope, marked 'Returns,' which, when canvassed, shall be returned to the ballot box and the ballot box will again be securely locked. * * *"

From the other precincts involved there appears to have been returned by the election officers no envelope indorsed "Returns," containing the two duplicate certificates required by the statute. The only envelope returned was the one indorsed as heretofore mentioned; and the certificates from which the can-

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vass of returns of these precincts are to be made by the county election board, if executed and returned by the precinct boards, are in said envelope with the ballots and tally sheets, which plaintiff desires the court to compel by mandamus the county election board to open. But it is clear from the foregoing quoted portion of the act that the county election board is without authority to open this envelope. It was the purpose of the statute to preserve intact the ballots, the tally sheets, the unvoted ballots, and the stub books of the ballots, untouched by any other hands than those of the precinct election officers, in order that they may be used in case of contest or in any other legal proceeding wherein they may become important as evidence. It was evidently contemplated by the Legislature that any procedure that permitted these ballots and tally sheets to be handled after they left the hands of the precinct election officers would render the perpetration of fraud in the alteration and change thereof easy, and the responsibility therefor difficult to locate, and would reduce greatly their value as evidence in any proceeding, civil or criminal, in which they might be needed. The delinquency as to these precincts lies not in the county election board, but in the respective precinct election boards in failing to make up properly the returns and inclose the necessary certificates in the envelope indorsed "Returns" as provided by statute. Whether in a proceeding for that purpose the returns as made to the county election board might not be required to be returned to the precinct election boards and said precinct election boards compelled yet to make the returns as the statute requires, or whether if the precinct election boards, before the canvass of the returns, had appeared before the county election board and requested permission to have returned to them the election boxes so they could make up the returns as required by the statute, it would not be the duty of the county election board to permit them to do so, are questions this proceeding does not present. It is clear to our minds that the statute does not make it the duty nor authorize the county election board to open the envelope containing the voted ballots and tally sheets for the purpose of searching for that portion of the returns upon which the statute requires the canvass to

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be made, and in unmistakable language prohibits them from doing so. The writ of mandamus will not compel them to do under order of the court that which they could not do without such writ. The function of the writ is not to create duties that did not theretofore exist, but to compel the performance of duties theretofore imposed by the law.

It is urged by defendants in error that, although it be their duty to canvass any of the returns which they have refused to canvass, plaintiff in error has a plain, speedy, and adequate remedy at law, and his action for mandamus will not lie. This contention is not sound. This is not an action to obtain possession of an office or try the title thereto. If such were the relief sought, the proper remedy would be a contest or *quo warranto* proceeding; but the relief plaintiff in error seeks is to have the county canvassing board make a full and complete canvass of the legal returns before it and declare the result of the election from a canvass of all the returns before the board, instead of a canvass of a part of them, and to issue a certificate of election accordingly. To secure the performance of a ministerial duty, enjoined by law upon an officer, the only adequate remedy ordinarily is that of mandamus *Rummel v. Dealy, supra*. We know of no remedy by which plaintiff could secure the performance of its duty by the board other than the one he has pursued.

The judgment of the trial court is accordingly reversed and the cause remanded, with instructions that the writ issue as to Hulbert precinct No. 1.

TURNER, C. J., and WILLIAMS and KANE, JJ., concur; DUNN, J., absent, and not participating.

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HOCKER v. CARROLL.

No. 2074. Opinion Filed December 3, 1912.

Rehearing Denied January 14, 1913.

(129 Pac. 56.)

EXEMPTIONS—Proceedings to Protect—Notice of Claim. The United States Commissioner for P. commissioner's district, after issuing an execution based on a judgment on a contract, absented himself from said district so that the judgment debtor could not give notice of his intention to claim as exempt a mare levied upon under said execution, which he was entitled to claim as exempt under the laws then in force in the Indian Territory. At the execution sale the debtor gave notice of his intention to claim the mare as exempt. In an action in replevin by him against the execution purchaser for possession of the mare, held, he was entitled to recover.

(Syllabus by the Court.)

*Error from District Court, McClain County;
R. McMillan, Judge.*

Action by F. J. Carroll, for the use of the Union National Bank, against J. W. Hocker. Judgment for plaintiff, and defendant brings error. Affirmed.

J. W. Hocker, pro se.

Glasco & Jacobs, for defendant in error.

WILLIAMS, J. The defendant in error, for the use of the Union National Bank, as plaintiff, commenced an action in the mayor's court of the incorporated town of Purcell, against the plaintiff in error, J. W. Hocker, as defendant, on September 5, 1907, to recover a certain iron gray mare.

Execution issued by the United States Commissioner for the Southern Judicial District of the Indian Territory, at Purcell, on a judgment on a contract, and the defendant sought to claim the mare as exempt. When the execution was placed in the hands of the constable for said district, said commissioner was absent on a 30-day vacation. After due notice to the plain-

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tiff by the judgment debtor that he would file his schedule of exemptions as provided by section 3006 of Mansf. Dig of Ark. (section 2121, Ind. Ter. Ann. St. 1899), he filed same with the commissioner for the Ardmore district. Said schedule was disallowed on the ground that he had no jurisdiction in the premises. Afterward the mare was sold under said execution, and in due time a replevin action was commenced for her recovery. The Southern judicial district and the Purcell commissioner's district corresponded respectively to a county and township by the statute of Arkansas, extended by section 9 of the Act of March 1, 1895, c. 145, 28 St. at L. 693, in force in the Indian Territory. *Graham v. Stowe*, 1 Ind. T. 405, 37 S. W. 837; *Watkins v. United States*, 3 Ind. T. 281, 54 S. W. 819; *Purcell W. Gro. Co. v. Bryant*, 6 Ind. T. 78, 89 S. W. 662; Act May 2, 1890, c. 182, sec. 32, 26 St. at L. p. 81; section 4, c. 145, 28 St. at L. p. 693.

In *Thompson v. Ogle*, 55 Ark. 101, 17 S. W. 583, it is said:

"In a case in which the defendant failed to claim his exemptions before sale, on account of absence in attendance upon a sick family, the Supreme Court of California held that the sale was no bar to his claim. *Haswell v. Parsons*, 15 Cal. 266. And this court held that a sale did not divest a debtor's homestead where the failure to claim it before sale was occasioned by the fraud of the plaintiff. *Carter v. Jennings*, 53 Ark. 242. If a failure to make the claim in proper time may be excused for fraud, upon like principle it would, we think, be excused for unavoidable accident or mistake. In this case the debtor did everything in his power to assert his constitutional rights in the manner provided by the statute. On the day of the levy he gave notice of his intention to claim his exemptions; he could do nothing more until after a lapse of five days, and within that time he died. He was still the owner of the property, subject to a defeasible lien which he was proceeding to displace, when prevented by his death. As he left a widow and personal estate, including the mule, worth less than \$300, it passed to her. * * * She could not prevent the sale by filing the schedule and obtaining a supersedeas, for this remedy is provided for the debtor only. But she did all that she could do to assert her rights and hold the property, and all that it was necessary to do to protect the judgment creditor, as well as bidders at the execution sale, by giving notice at the sale of her rights and intention to asser

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them. When the policy of the law is considered, it cannot be held that she forfeited its benefits because she did no more."

Statutory provision was made for the issuance of executions by justices of the peace when the justice of the peace was absent from his office so that he could not be found, or when he was absent from his township or county for more than ten days. Sections 4107 and 4108 of Mansf. Dig. of Ark. (sections 2787 and 2788, Ind. T. Ann. St. 1899). Also when no justice of the peace was in the township, or when all the justices thereof were disqualified, actions may be brought before some justice of the peace in some other township in the county. Section 4031 of Mansf. Dig. of Ark. (section 2711, Ind. T. Ann. St. 1899). The jurisdiction of the justice of the peace is coextensive with the county in which he is elected or appointed. Section 4027, Mansf. Dig. of Ark. (section 2707, Ind. T. Ann. St. 1899). All the foregoing sections of Mansfield's Digest were extended in force in the Indian Territory by acts of Congress. Section 31 of Act of May 2, 1890, 26 St. at L. p. 91; section 4 of Act of March 1, 1895, c. 145, 28 St. at L. p. 693.

Such United States commissioner was not authorized to sit as justice of the peace outside of his township or district. *Leiber v. Argabright*, 25 Okla. 177, 105 Pac. 341; sections 2696, 2697, and 2698, Ind. Ter. Ann. St. 1899 (sections 4016, 4017, and 4018, Mansf. Dig. of Ark.); section 4, c. 145, 28 St. at L. p. 693.

Section 4, c. 145, Act of Congress of March 1, 1895 (28 St. at L. p. 693), provides as follows:

"* * * The judge for each district may fix the place where, or the time when, each commissioner shall hold his regular terms of court. The order appointing such commissioners shall be in writing and shall be spread upon the records of one of the courts of the district for which they are appointed; and such order shall designate, by metes and bounds, the portion of the district for which they are appointed. They shall have all the powers of commissioners of the circuit courts of the United States. They shall be *ex officio* notaries public and *ex officio* justices of the peace within and for the portion of the district for which they are appointed, and shall have the power as such to solemnize marriages. . * * *

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In *Thompson v. Ogle, supra*, the widow of the deceased debtor, who left a personal estate, including the live stock, worth less than \$300, it passing to her by virtue of the statute, could not prevent the sale by filing the schedule to obtain a supersedeas. Section 3006 of Mansf. Dig. of Ark. (section 2121, Ind. T. Ann. St. 1899). If the widow by operation of law, succeeding to the rights of her deceased husband after notice was had, could not file the schedule and cause supersedeas to issue, how can the conclusion be reached that when the justice of the peace or commissioner is absent so he cannot be found, or when he is to be absent from the township or county for over ten days and has deposited his docket with the nearest justice of the peace or commissioner in the county, then, any justice of the peace or commissioner of the county being authorized to issue an execution on any judgment rendered by such absent justice of the peace or commissioner, that any justice of the peace or commissioner in the county would have a right to entertain the filing of the schedule upon an execution issued by such absent justice of the peace or commissioner?

Statutes conferring jurisdiction upon justices of the peace are to be strictly construed and not to be aided or extended by implication beyond their express term. *St. Louis & S. F. R. Co. v. Couch*, 28 Okla. 331, 114 Pac. 694; *Sims v. Kennedy*, 67 Kan. 383, 73 Pac. 51.

It is not within the express terms of the statute that any other than the justice of the peace issuing the execution may entertain the filing of the schedule of exemptions. The absenting of the commissioner from the Purcell district, after the issuance of the execution, appears to bring this case within the rule in *Thompson v. Ogle, supra*. The debtor would be excused for unavoidable accident or mistake in failing to make the claim for his exemptions under the procedure laid down by the statute.

Bouvier defines "accident" to be "an event which, under the circumstances, is unusual and unexpected by the person to whom it happens. The happening of an event without the concurrence of the will of the person by whose agency it was caused. * * *

The absence of the commissioner from his township or district

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was unavoidable, so far as the debtor was concerned, and entitled him, after giving notice at the execution sale of his rights and of his intention to assert them, to maintain a replevin action for the recovery of his exempt property. This is in line with the principle announced by paragraph 4 of the syllabus in *J. W. Ripey & Son v. Art Wall Paper Co.*, 27 Okla. 600, 112 Pac. 1119, which has also been reaffirmed in *Duffield v. Ingraham*, ante, 128 Pac. 111. *Binion et al. v. Lyle*, 28 Okla. 430, 114 Pac. 618, arose under the statutes of Oklahoma Territory.

It is not essential to pass on the question of the amendment of the schedule filed before the Ardmore commissioner, as he had no jurisdiction to entertain the filing of such schedule. The judgment of the lower court must be affirmed.

All the Justices concur.

SNYDER v. BLAKE.

No. 3266. Opinion Filed October 22, 1912.

Rehearing Denied January 14, 1913.

(129 Pac. 34.)

ELECTIONS—Contests—Fraud—Evidence. One who seeks to have an election declared void and set aside upon the ground that by irregularities and fraudulent misconduct of the election officers in some precincts persons were prevented from voting must allege and prove that such persons were qualified voters, and that the number thereof was sufficient that if they had voted and had cast their vote for the next highest candidate the result of the election would have been changed.

(Syllabus by the Court.)

Error from District Court, Wagoner County;
R. C. Allen, Judge.

Action by A. L. Snyder against Harrie Blake. Judgment for defendant, and plaintiff brings error. Affirmed.

A. A. Davidson and Robert F. Blair, for plaintiff in error.

Joseph S. Dickey, Jr., for defendant in error.

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HAYES, J. This is an action in the nature of a *quo warranto*, brought by plaintiff in error in the court below to try the title to the office of clerk of the district court of Wagoner county, and grows out of the general election held in that county on November 8, 1910, for the purpose of electing state and county officers.

Plaintiff in error, who will hereinafter be referred to as plaintiff, was elected to the office of clerk of the district court of Wagoner county on September 17, 1907, and thereafter duly qualified and took charge of said office, by reason of which facts he was entitled to hold same until the second Monday in January, 1911, and until his successor was duly elected and qualified. At the election on November 8, 1910, plaintiff was a candidate as the nominee and candidate of the Republican party to succeed himself, and defendant was, as candidate and nominee of the Democratic party for said office, plaintiff's competitor. At that election, as shown by the returns duly canvassed by the election board of the county, a total of 1,675 votes were cast for all candidates for said office, of which number 937 were cast for defendant and 738 for plaintiff, or a majority of 199 in favor of defendant. By reason thereof, there was issued to defendant a certificate of election, and he thereafter qualified and took possession of the office. Plaintiff now seeks to oust defendant from the office and to obtain possession thereof upon the ground that the election of 1910 as to said office was void and should be set aside on account of fraud and misconduct on the part of the election officers or some of them, in said county, and of other persons set forth in his amended petition. Plaintiff does not contend that he received a sufficient number of votes at said election, or would have received a sufficient number of votes in the absence of the alleged fraud and misconduct on the part of some of said election officers to have elected him to said office, but alleges in his petition that a sufficient number of qualified voters were deprived by the wrongful misconduct of the election officers of the right to vote to render the result of said election doubtful and the real choice of the people of a candidate for said office impossible of determination.

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In his petition in the lower court, plaintiff alleges in detail and at much length the various fraudulent acts and misconduct of the election officers which he claims invalidate the election. We shall, however, state only the general substance of those allegations. He alleges that prior to the election of 1910 Wagoner county was divided into 25 voting precincts; that no change or alteration had been made in such precincts prior to, that election, but that at that election polls were opened in only 21 places in the county; that at five of such precincts the polling places were not at the usual and established places for holding elections in such precincts; that the voters of two precincts were required to vote at one place, which was not the established polling place of either of the theretofore existing precincts. He alleges that in various precincts in the county a large number of negro voters were present on the election day for the purpose of presenting themselves to the election officers of the various precincts to vote and remained there for such purpose all day; that only a few of such voters at each place were permitted to and did enter the polling places for the purpose of qualifying as voters; that at such places such proposed voters were subjected to a pretended examination which occupied the whole of said day; that other voters in large numbers present had no opportunity to present themselves to the election officers and prove their qualifications to vote; that in some precincts persons who established their qualifications to vote were by the election officers arbitrarily refused the right to do so and were prevented from voting. The number of voters he alleges to have been deprived of the privilege of voting by these acts of the officers is in excess of a number sufficient to have changed the result of the election, had they been permitted to vote, and all of them had cast their votes for plaintiff.

Defendant in his answer alleges that, if the voters were deprived of the privilege of voting at said election by the election officers, it was done without defendant's knowledge or consent, and that the same was done by the election officers in an honest and faithful effort to discharge the duties of their offices, and that their action was free from any fraud whatever. He further

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alleges that there was a conspiracy between the central committee of the Republican party of the county of which plaintiff was the nominee, and the political friends and adherents of plaintiff, to defeat defendant by inducing persons who were not qualified voters to vote at said election; and that in furtherance of said conspiracy they had caused threats to be made and sent to the election inspectors throughout the county, threatening such officers with prosecution if they enforced certain provisions of the election laws of this state, to be found in section 4a, art. 3, of the Constitution; and that many negroes, in furtherance of this conspiracy, who were not entitled to vote, crowded about the polling places on the day of the election, demanding the privilege to vote, creating confusion and hindering and obstructing the election officers; and that, because of such confusion and acts of alleged illegal voters, the election officers were hindered and delayed in the conducting of said election.

The cause was tried to the court without a jury. The trial court made a general finding in favor of defendant, and also found specifically as to certain issues of fact presented by the pleadings. He found that the alleged changes in the election precincts complained of by plaintiff had been regularly made by the county election board after due notice thereof had been posted throughout the county. He found "that the persons offering or attempting to offer themselves to vote at the different polling places throughout the county were fair and honestly dealt with by the election officers; and the action of said officers was free from fraud or oppression, except as to about 30 or 40 persons who offered themselves to vote; and the evidence does not show whether or not said 40 persons were legal voters." He also found that "the allegations of plaintiff's petition charging conspiracy and fraud are not sustained by the evidence." Upon the general finding and these special findings, a judgment was rendered for defendant.

Counsel for plaintiff has set out in his brief *in totidem verbis* the thirteen assignments of error alleged in his petition in error, but he does not in his brief separately set forth and number the specifications of error complained of and argument and cita-

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tion of authorities in support of each point relied upon in the same order as required by rule 25 (20 Okla. xii, 95 Pac. viii) of this court. An enforcement of this rule would require an affirmance of the judgment of the trial court, or a dismissal of this appeal without any consideration of the case upon the merits; but, from the argument in the brief, it can be gathered that plaintiff's complaint here is that the finding of the trial court exonerating the election officers from any conspiracy or fraudulent acts by which any one was prevented from voting is not sustained by the evidence.

The conduct of the election officers complained of pertains to the manner in which they enforced or attempted to enforce the provisions of section 4a, art. 3, of the Constitution. That section reads as follows:

"No person shall be registered as an elector of this state, or be allowed to vote in any election herein, unless he be able to read and write any section of the Constitution of the state of Oklahoma; but no person who was, on January 1, 1866, or at any time prior thereto entitled to vote under any form of government, or who, at that time, resided in some foreign nation, and no lineal descendant of such person shall be denied the right to register and vote because of his inability to so read and write sections of such Constitution. Precinct election inspectors having in charge the registration of electors shall enforce the provisions of this section at the time of registration, provided registration be required. Should registration be dispensed with, the provisions of this section shall be enforced by the precinct election officers when electors apply for ballots to vote."

Under the foregoing provision, no person who was not on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who did not at that time reside in some foreign nation, or who was not a lineal descendant of such person, was entitled to vote at the election, unless he was able to read and write any section of the Constitution. There is evidence on the part of plaintiff tending to establish that in several of the election precincts in Wagoner county at the election involved herein the precinct election officers, when any negro offered himself as a voter to vote at said election, he was examined by the election officers, touching his qualifications under

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the foregoing provision of the Constitution; and that the examination of each such person who offered himself to vote was prolonged a great and unnecessary length of time by the election officers, ranging from 30 minutes to two hours; and that, pending the time such examination was being made touching the qualifications of such voter, no other negro voter was admitted to the election room to offer to qualify himself as a voter, and as a result of this practice many such persons who were present on the day of the election for the purpose of voting were prevented from offering proof as to their qualifications to vote and were prevented from voting. The evidence on behalf of defendant, on the other hand, as to some of the precincts involved, contradicts the evidence of plaintiff that such conduct was indulged in by the election officers, and the finding of the trial court as to such precincts is conclusive upon this court. There are, however, certain precincts as to which it does not seem to us that the evidence of defendant substantially conflicts with the evidence of plaintiff to the effect that the foregoing practice of the election officers was followed.

When any person who was not entitled to vote under any form of government on the 1st day of January, 1866, and who did not at that time reside in some foreign nation and was not a lineal descendant of such person, presented himself as a qualified voter and asked the privilege of voting, the precinct officers were authorized to require such person to read and write a section of the Constitution before permitting him to vote. *Ex parte Show*, 4 Okla. Cr. 416, 113 Pac. 1062.

But when such proposed voter read intelligibly and wrote legibly the section of the Constitution designated by the election officers, he demonstrated his qualifications to vote, and acts on the part of the election officers requiring him to write at great length many provisions of the Constitution, or detaining him for any great length of time under a pretense of examination, and thereby delaying other persons from entering the polls, was without authority of law.

A large number of persons, variously estimated from 250 to 400, mostly negroes, congregated at the polling place at Vans

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Lake on election day. Many of them came for the purpose of voting. Some of them offered to qualify as voters, but were refused permission to do so, because the election officers were engaged at the time in examining other persons as to their qualifications. One person, who had been a teacher in the public schools and had taught 30 years, was admitted to the booth and questioned concerning his qualifications to vote; and, upon being required to read and write a section of the Constitution, he read seven or eight pages of the Constitution and was then given a tablet and pencil to write. One of the officers read slowly to him from the Constitution, and the proposed voter wrote as he was dictated to until he had written some 21 pages. After he had been detained in the booth for two hours and fifteen minutes, he was held by the election officers not qualified and was denied the privilege of voting. Another person who had been principal of a school for five years made application to vote; and, upon its being determined that he would be required to read and write a section of the Constitution, he read a section of the Constitution, and thereupon proceeded to write dictations made to him by one of the election officers, and was detained in the booth for an hour and 30 minutes, during most of which time he was employed in writing, and at the end thereof, was pronounced disqualified to vote. Practically the entire day at this precinct was consumed by the election officers in the examination of eight persons, and the other persons at the polls who desired to offer to vote and be examined touching their qualifications therefor were denied the opportunity to do so. At another precinct no negro was permitted to vote unless he could immediately memorize a section of the Constitution selected and read to him by the election inspector and write the same from memory. At this precinct there were 40 persons present for the purpose of qualifying themselves to vote under the foregoing provision of the Constitution. Of this number, 37 could read and write; but under the rule adopted by the board requiring such proposed voters to memorize immediately any section of the Constitution read to them and to write the same, none was able to qualify, and all were denied the privilege of voting. The conduct of the

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election officers at these precincts can find no justification in the law, and their protest that they acted in good faith is refuted by their conduct.

But, under our views of this case, it is not material whether the conduct of the election officers was actuated by a fraudulent purpose or pursued in good faith under a mistaken interpretation of the law as to the duties it imposed upon them. The vital question in the case is whether by such conduct a sufficient number of qualified voters were deprived of the right to vote that, if they had all voted and cast their votes for plaintiff, the result of the election would have been changed.

In *Martin v. McGarr*, 27 Okla. 653, 117 Pac. 323, 38 L. R. A. (N. S.) 1007, this court held:

“An election is void where qualified electors are corruptly and fraudulently deprived of an opportunity to register and vote sufficient in number, had all been counted for the next highest candidate, to have changed the result of the election’.

The question in that case was presented upon a demurrer to a petition which alleged that, at a certain election in the city of Muskogee by reason of various fraudulent and corrupt acts of the election officials who conducted the election, a sufficient number of qualified voters were deprived of the right to vote to change the result of the election, and that by reason thereof the election was void. The question directly under consideration in that case was whether the denial of a sufficient number of qualified voters of the right to vote at any election in numbers sufficient to change the result of the election, if they had been permitted to vote, and had all cast their votes for the candidate receiving the smaller vote, operated to render the entire election void, or to render void only the vote in the precincts where such irregularities occurred. Whether the effect would be different when denial of such right was the result of fraud and misconduct of the election officers from its effect when the injuries were the result of a misinterpretation of the law or mistakes made by the election officers attempting in good faith to enforce the law, was not considered.

In *McCrary on Elections*, par. 527, it is said:

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"The fact that the right to register or to vote has been denied to any person or persons duly qualified to vote may always be shown in a case of contested election, whether such denial was fraudulent or not. The effect upon the rights of electors and upon the result of the election is the same whether such denial be the result of intentional wrong on the part of the officers of the election, or of accident, or an honest mistake as to the law. And if the number of voters whose rights have thus been denied is large enough to materially affect the result, such denial will vitiate the election."

Although we think, as to some of the precincts, the general finding of the court that there was no fraud or misconduct on the part of the election officers cannot be sustained, this error cannot be material or result prejudicially to plaintiff, unless the evidence establishes that as a result of such conduct qualified voters who attended the polls on election day for the purpose of voting, and who would have voted but for such conduct of the officers, in a great number, sufficient to have changed the result of the election, were prevented from voting. While there is much evidence to the effect that there was a large number of persons about the polls in some of the precincts on election day who did not vote and who probably were deterred from offering to vote because of the procedure adopted by the election board, there is an entire absence of any evidence, except as to between 50 and 60 of such persons, that they were qualified electors. But if these 50 or 60 persons had not by the irregular conduct of the election officers been prevented from offering to vote or from voting, and they had all cast their votes for plaintiff, the result of the election would not have been changed. It is admitted in the record that at these precincts, where the irregularities occurred and at the other precincts of the county in which no irregularities were established, 1,675 persons cast their votes, whose qualifications to vote are not questioned. It is a rule of law adopted by almost all of the courts that the entire vote of an election or of a precinct will not be rejected, where it is possible to ascertain and eliminate the fraudulent vote. 15 Cyc. 372. Irregularities and misconduct in conducting an election do not vitiate the election, unless the irregularities or misconduct are in violation of mandatory provisions of the statute, or such in

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themselves as to change the result or render it impossible to ascertain the result of the election. *Williamson v. Musick*, 60, W. Va. 59, 53 S. E. 706; *O'Laughlin v. City of Kirkwood et al.*, 107 Mo. App. 302, 81 S. W. 512.

If the influence of the fraud, corrupt practice, or irregularities upon the result of the election can be shown with reasonable certainty, the courts require that to be done, and the votes affected thereby are rejected and the result of the election determined by the unaffected votes legally cast. It is not sufficient to vitiate an entire election that fraud or irregularities have been committed; it must be shown that such fraud or irregularities deprived some one of the right to vote who was qualified to do so, or so changed the vote cast that it did not express the uncorrupted and free choice of the voter. Irregularities or fraudulent conduct on the part of the election officers, that may have prevented or deterred persons who were not qualified to vote from offering to vote and from voting, do not, however reprehensible such conduct is, affect the result of the election. Under the rule announced in *Martin v. McGarr*, *supra*, a legal voter qualified to vote at the place where he offers to vote, but who is prevented from doing so by the fraudulent, corrupt, or mistaken conduct of the election officers, may have his vote counted for the purpose of ascertaining whether, if he had voted, the result of the election might have been different and therefrom it be determined that the result of such irregularities was to throw such doubt about the result of the election as to render the election void; but a vote of a person who is not qualified to vote can be counted and considered for no purpose. The presumptions are in favor of the validity of the election, and the burden is upon plaintiff who questions its validity to show facts sufficient to destroy it.

As to what consideration will be given in election contests and *quo warranto* proceedings to votes illegally rejected, the authorities are not in harmony, where not controlled by statutory or constitutional provisions. By some it is held that, upon its being shown for whom the rejected votes would have been cast, if they had not been illegally rejected, they shall then be counted

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for such candidate. Others hold, as held by this court in *Martin v. McGarr*, *supra*, that it is sufficient to show that votes of qualified electors have been illegally rejected, and they can then be considered as if they had been cast for the candidate having the next highest in number as shown by the returns; and, if the rejected votes be sufficient to change the result of the election, then the election will be declared void for uncertainty. The former of these rules is established and prevails in the federal House of Representatives. In *Frost v. Metcalfe*, 1 Ellsworth's Election Cas. 289, it was held that, in order to authorize rejected votes to be counted, it was necessary to establish: First, the person offering to vote must have been a legal voter at the place where he offered to vote; second, he must have offered to vote; third, it must have been rejected; and, fourth, it must be shown for whom he offered to vote. The requirement that the burden is upon plaintiff to prove the qualifications of the voter whose vote is rejected is not an impossible or unreasonable burden; it is a fact easily susceptible of proof, and can, as a rule, be established by the evidence of the person who has been prevented from voting.

Since plaintiff has failed to establish that a sufficient number of qualified electors were prevented by the misconduct and irregularities of the election officers from voting to have changed the result, had they been permitted to vote and had voted for him, the judgment of the trial court refusing to declare the election void should be affirmed.

TURNER, C. J., and KANE and DUNN, JJ., concur; WILLIAMS, J., concurs in the conclusion.

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No. 2086. Opinion Filed January 21, 1913.

(129 Pac. 867.)

1. **MUNICIPAL CORPORATIONS—Street Grading—Surface Water—Injury to Abutting Premises—City's Liability.** Where a city in grading a street and its cross-streets causes the surface waters on said cross-streets, flowing into the same from adjacent territory, to be diverted from their natural course, and to be collected and carried together with the waters of the main street to a low point on said street, and negligently fails to provide sewers as an outlet for said waters, or in providing sewers, negligently provides sewers inadequate for an outlet for said waters, and thereby causes said waters so collected and conveyed to such point to back upon and overflow abutting premises which are four inches above the grade established by the city, and over which said waters did not theretofore flow, the city is liable to the owner of such abutting property for the damages caused thereby.
2. **TRIAL—Time of Trial—Issues.** Section 5834, Comp. Laws 1909, provides when actions are triable. Under its provisions, when a demurrer to a petition is overruled, but it is not adjudged frivolous and leave to answer is given, the case is not triable upon issues of fact until ten days after the filing of the answer; and it is error to compel, over the objection of a party to the action, a trial of the case on the date such demurrer is overruled and the answer filed.
3. **DAMAGES—Real Property—Permanent and Temporary Injuries.** For negligent injuries to realty which result from a cause susceptible of remedy or abatement, the owner is entitled to recover therefor only such damages as had accrued on account of the impaired or lost use of his property up to the time of the commencement of his action. For injuries resulting from permanent cause, the owner may recover in a single action his entire damages, to wit, that amount which represents the permanent depreciation of the realty in value in consequence of the injury.
4. **SAME.** When a cause of an injury is abatable, either by an expenditure of labor or money, it will not be held permanent.
5. **MUNICIPAL CORPORATIONS—Defective Sewers—Injury to Abutting Property—Damages.** The owner of a lot sued a city for damages resulting from the negligent construction of sewers inadequate to carry off storm and surface waters which the city had, by grading its streets, diverted from their usual course, and brought to a point near plaintiff's property. The volume of waters, being too great to be discharged through the sewers provided, were forced back upon plaintiff's property, thereby damaging and destroying certain personal property, and rendering less suitable for business the buildings thereon. The defect in

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the sewers being remedial by expenditure of money and labor, it was error for the court to authorize the jury by its instructions to consider as an element of plaintiff's damages future loss of rents and depreciation in the value of the real estate.

(Syllabus by the Court.)

*Error from District Court, Carter County;
W. L. Barnum, Assigned Judge.*

Action by J. T. Orr against the City of Ardmore. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Defendant in error, hereinafter called plaintiff, filed his petition in the district court of Carter county on the 17th day of October, 1908, against plaintiff in error, hereinafter called defendant or the city, in which he alleges that he is the owner of lot No. 20, in block 233, situated and fronting on what is known as Caddo street, in the city of Ardmore, an incorporated city of the first class, and that said property was damaged on account of certain acts of the city which, as alleged, are, in substance, as follows: Situated on plaintiff's lot are three buildings, one of which is a frame and the other two are brick. Prior to 1907 the surface waters falling and flowing on Caddo street were drained off through two stone sewers constructed under a railway track on the east side of Caddo street. The opening of one of the sewers was at a point about 150 feet from where Main street intersects Caddo street, and the opening of the other was at a point near where Fourth avenue intersects said street, and, until the acts of the city hereinafter mentioned, these sewers were sufficient to drain thoroughly all the waters flowing into Caddo street. Caddo street, prior to 1907, was so graded that the low point of said street is at a point where the first-named sewer opens into said street, and all the waters flowing from the south and for a number of blocks from the north on said street flow to that point. During the spring and summer of 1907 the city graded and paved Caddo street, and closed up the opening in the sewers near Fourth avenue, and diverted the waters which naturally run through that sewer and turned them so they run down to the opening of the sewer near Main street. At the same time the city made the

Statement of Facts.

opening of the last-named sewer so small that it was not capable of conducting and carrying off all the waters that flowed thereto. During the same spring and summer the city graded various streets which cross Caddo street from east to west in such a way that it diverted all the waters which run down said cross-streets, and threw them into Caddo street. Prior to this time the natural drainage took care of the waters running down said cross-streets, but by reason of the grading of such streets the waters therein were turned into Caddo street and forced to find their outlet through the above-mentioned sewers, which were not large enough for that purpose. As a result thereof, when a rain occurred in the early part of the year 1908, the waters accumulated on Caddo street at the low point, and overflowed plaintiff's property. Plaintiff had constructed his sidewalks and his buildings at a grade about four inches higher than the grade required by the survey of the city, but the waters nevertheless overflowed his property and damaged same. The municipal authorities of the city, after having been notified by plaintiff of the insufficiency of the sewers and the effect on the grading of the streets upon plaintiff's property, causing it to be overflowed and damaged, failed and refused to correct same. Plaintiff alleges that one of his buildings is occupied by himself for bottling works purposes, and that a considerable amount of his property situated in this building was either damaged or destroyed by the flood waters, in the amount of \$50; that the other two buildings situated on said lot were rented by him to parties for business houses; that, on account of the constant danger of overflow, his tenants refused to remain in the property; that he lost rents on said buildings; and that the same have been rendered practically worthless, and he is unable to rent same at any price, and he prays for damages in the sum of \$2,500. After defendant's demurrer to this petition was overruled, it filed an answer, which, after admitting certain allegations of the petition, denies that prior to the grading of Caddo street and the construction of the improvements thereon named in plaintiff's petition there were sufficient curverts to carry off all the waters on that street during unusual rains and cloud-bursts. It admits the paving of the streets, but denies it negli-

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gently and carelessly closed up or reduced the size of the sewers, as alleged in plaintiff's petition, or that the waters have so accumulated upon Caddo street as to exceed the capacity of said sewers. It alleges that the grading done by it was under the supervision of a skillful engineer, and that all said work was done in a skillful manner; and that the city had not been guilty of negligence in the construction of the sewers or in the paving of its streets, and made other allegations of defense which are not necessary to be stated.

A trial to a jury resulted in a verdict and judgment for plaintiff in the sum of \$465. It is to reverse that judgment that this appeal is prosecuted.

J. B. Moore, for plaintiff in error.

HAYES, C. J. (after stating the facts as above). Defendant's first assignment of error complains of the action of the court in overruling its demurrer to plaintiff's petition. The gist of plaintiff's cause of action is summed up in his petition in the last paragraph as being the wrongful acts, negligence, and carelessness of defendant in closing up one of the storm sewers, and reducing the size of the other so as to make it too small to carry off the waters which the grading of Caddo street concentrated at that point, and which resulted from diverting a large part of the surface water from its natural drainage on the cross-streets into Caddo street.

This court has had occasion to consider and discuss the right of a proprietor under the rule at common law to divert or fight back surface water from his premises, and the conclusion of this court is that the rule supported by the weight of the American authorities from states in which the common-law rule prevails, as well as by some of the recent English cases, is that one may not in diverting surface water from its usual and ordinary course collect and convey by embankments, ditches, or artificial channels such water to the premises of another and therefrom permit it to overflow the lands of such proprietor, which, before the construction of the roads, ditches, or artificial channels, it did not overflow. *Chicago, R. I. & P. Ry. Co. v. Johnson*, 25 Okla. 760.

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107 Pac. 662, 27 L. R. A. (N. S.) 879; *Chicago, R. I. & P. Ry. Co. v. Davis*, 26 Okla. 434, 109 Pac. 214.

In *Town of Norman v. Ince*, 8 Okla. 412, 58 Pac. 632, the act of the city complained of was that it had carelessly and negligently constructed a standpipe adjacent to plaintiff's property which overflowed and discharged water on plaintiff's premises, by reason of which the premises became worthless. The city defended upon the ground that as a municipal corporation it was acting under authority of the statute, and could not be subjected to liability for damages arising from the exercise of such authority, so long as such authority was properly exercised and not exceeded. In the opinion a number of cases are cited, supporting the conclusion of the court that the city was liable, that are in point in the case at bar, among which are: *Field v. Inhabitants of West Orange Tp.*, 36 N. J. Eq. 118; *Inhabitants of West Orange Tp. v. Field*, 37 N. J. Eq. 600, 45 Am. Rep. 670; *Ashley v. City of Port Huron*, 35 Mich. 301, 24 Am. Rep. 552; and Mr. Justice Hainer, delivering the opinion of the court, said:

"Applying these well-settled principles to the case under consideration, it must follow that a municipal corporation, in the exercise of its corporate powers to construct and maintain public works, has no right to collect water by artificial means, and discharge it, or permit it to discharge or overflow upon the premises of an adjacent freeholder, so as to interfere with his possession. And in this respect a municipal corporation stands upon the same footing as a private individual, and incurs the same liability. Manifestly, for a municipal corporation to collect water by artificial means, such as a water standpipe, and conduct it in such a careless and negligent manner as to allow it to overflow and flood the premises of an adjacent lot owner, is such an invasion of private property as to constitute an appropriation of it to the public use, and the principle exempting municipal corporations from liability arising from damages occasioned by the exercise of their discretionary powers in the construction and maintenance of public works does not apply, and the corporation is liable for damages resulting therefrom. The same rule of law which protects the rights of the property of one citizen against the invasion of another citizen must protect it from similar aggressions on the part of municipal corporations. The petition of the plaintiff states a good cause of action, and the demurrer, therefore, was properly overruled."

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In the recent case of *City of Chickasha v. Looney*, not yet officially reported, 128 Pac. 136, it is said in the syllabus:

"It is an actionable wrong for a municipal corporation to negligently construct or maintain a sewer whereby surface waters are diverted and by artificial means collected in a body and discharged upon growing crops of a private individual to his detriment."

Measured by the rule established by the foregoing cases in this jurisdiction, plaintiff's petition states a cause of action. In support of his contention to the contrary, counsel for defendant has cited and relied upon *Adams v. Oklahoma City*, 20 Okla. 519, 95 Pac. 975. We think that the facts in that case distinguish it from the case at bar in that the action complained of therein was not that the surface waters had been diverted from their usual course and brought to overflow upon plaintiff's premises, where they had not flowed before, but that the city in grading its streets to the established grade by elevating same turned back the surface water therefrom which subsequently overflowed the grade of the street and down over plaintiff's property. The exact question decided in that case is accurately expressed in the first paragraph of the syllabus as follows:

"Where a city in the exercise of its lawful authority (section 443, Wilson's Rev. & Ann. St. 1903) first establishes a grade on a street, and grades same with reasonable skill and care, it incurs no liability for consequential damages to abutting or adjacent proprietors."

There was in that case no contention of negligence or lack of proper construction of the work by the city. The city in the instant case has done more than just turn back the surface waters that flowed upon and across its streets. It has collected the waters flowing into Caddo street and into some of its cross-streets from the adjacent territory, diverted such waters from their usual course, and carried them to a low point near plaintiff's premises and negligently failed to provide a sufficient outlet for them to escape, and by reason thereof such waters, unable to escape, backed upon plaintiff's premises which have been elevated by him above the grade prescribed by the city and effected the damages complained of.

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Upon overruling defendant's demurrer, the court ordered that defendant file its answer within 30 minutes, and the cause proceed to trial. After filing its answer, defendant moved the court for a continuance of the cause, upon the ground that the issues had not been made up until that date. Section 5834, Comp. Laws 1909, reads:

"Actions shall be triable at the first term of court, after or during which the issues therein, by the time fixed for pleading are, or shall have been made up. When the issues are made up, or when the defendant has failed to plead within the time fixed, the cause shall be placed on the trial docket, and if it be a trial case shall stand for trial at such term ten days after the issues are made up, and shall, in case of default stand for trial forthwith. When any demurrer shall be adjudged frivolous the cause shall stand for hearing or trial in like manner as if an issue of fact had been joined in the first instance."

This section authorizes a case to be set for trial at any time during a term, not earlier than ten days after the issues are made up, whether made up within the time fixed to plead before the term or during the term. *Swope & Son v. Burnham, Hanna, Munger & Co.*, 6 Okla. 736, 52 Pac. 924. An issue of law may be tried at any time. But that it was not contemplated, when a demurrer shall be overruled, that a defendant may be forced into trial immediately, unless such demurrer is adjudged to be frivolous, is indicated by different portions of the Code. The last sentence of the foregoing sections provides that, when any demurrer shall be adjudged to be frivolous, the cause shall stand for hearing or trial in like manner as if the issues of fact had been joined in the first instance. This sentence, following immediately the provision of the preceding sentence that the case shall stand for trial at the term for which it is set ten days after the issues are made up, and, in case of default, shall stand for trial at once, we think renders the meaning of the statute susceptible of little, if any, doubt. In addition thereto, section 5832 provides:

"No witness shall be subpoenaed in any case while the cause stands upon issues of law; and whenever the court shall regard the demurrer in any case as frivolous, and put in for delay only,

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no leave to answer or reply shall be given, unless upon payment of all costs then accrued in the action."

A party who has a demurrer pending, under this statute, is without power to prepare for trial, for he cannot have subpoenas issued for his witnesses; but the ten days' time required to intervene by section 5834 between the date the issues are made up and the trial of the cause affords an opportunity for the parties to obtain the presence of their witnesses. The demurrer was not adjudged frivolous by the trial court. Defendant was permitted to file his answer without any condition as to payment of the costs incurred up to that time, which he should have been required to do if the demurrer had been frivolous, and under the state of the law as determined by the decisions in this jurisdiction at the time of the trial—for none of the cases except the Adams case and the *Town of Norman v. Ince*, *supra*, had been at that time decided—defendant's demurrer should not be held frivolous, as the authorities from other jurisdictions are not harmonious upon the question which the demurrer presented. The cause, therefore, did not stand for trial on the date the demurrer was overruled, and could not under the statute, without agreement of the parties, be set for earlier than ten days after the time defendant filed its answer; and it was error to compel a trial of the case, over defendant's objection, on the date it was tried. *City of Eureka v. Ross*, 64 Kan. 372, 67 Pac. 849; *Harris v. Salt Co.*, 57 Kan. 24, 45 Pac. 58; *Rice et al. v. Simpson et al.*, 26 Kan. 143; *Rice v. Hodge*, 26 Kan. 164; *Gapen v. Stephenson*, 18 Kan. 140.

The allegations of plaintiff's petition as to the extent of damages sustained by him are substantially that personal property of the value of \$50, situated in the building at the time of the flood, was destroyed; that on account of said overflow and the probability of subsequent overflows the tenant in said building refused to remain therein, and that plaintiff had lost rents thereon; that his property had been rendered practically worthless, as a result of which he had sustained damages in the sum of \$2,500. There is evidence to sustain the allegation as to the loss of the personal property. There is also evidence that at the time

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of the overflow one of the buildings was occupied by a tenant who paid as rents thereon \$35 per month; that this tenant vacated the building because of its being rendered unsuitable by the overflow waters, and because of the probable recurrence of such overflow in the future; that plaintiff was unable to secure a tenant for said building for several months, after which he secured a tenant at the reduced rent of \$20 per month. There is also evidence that because of the overflow and the probability of subsequent overflows the property had depreciated in value, the exact amount of which is not established by the evidence. The instructions of the court, given over defendant's objection, authorized the jury to consider as a measure of plaintiff's damages all loss of rents sustained up to the trial of the cause and loss of rents that will result in the future, and all other damages that plaintiff has sustained, or may sustain in the future. The language of the instructions given is so comprehensive as to authorize a recovery of both the loss for rents in the past and in the future and for depreciation in the value of the property. In this the court committed error. To permit a recovery for both is to permit the recovery of double damages. It would be like permitting one to recover the value of property as for conversion and at the same time to recover the value of the use thereof during the time he is deprived of it.

If the damages by plaintiff are permanent, then the measure thereof is the value of the property destroyed, or the depreciation in the value of the property injured. The loss of rental value does not constitute part of the damages where there is a permanent damage to the value of the property; and, where the damage is not permanent, only damages occurring up to the time of the action are recoverable, and all future damages that may occur must be recovered by subsequent actions, and it is the duty of the court to see that one does not overlap the other. *Seely v. Alden*, 61 Pa. 302, 100 Am. Dec. 642; *City of San Antonio v. Estate of Mackey*, 22 Tex. Civ. App. 145, 54 S. W. 33; *Sutherland on Dam.* sec. 1042.

There is some confusion among the authorities upon the proper measure of damages in cases of the character of the in-

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stant case. The divergence arises in determining whether the particular nuisance or injury is permanent. If it is permanent, then the injured party may recover in one action all damages he has or may sustain as a result of the negligent-construction of the improvements complained of; but, if it is not permanent, then he may recover only such damages as he has sustained up to the time of the institution of his action. Section 1039, Sutherland on Dam.; *Chicago, R. I. & P. Ry. Co. v. Davis*, 26 Okla. 434, 109 Pac. 214. Some of the authorities make the test of permanency whether the structure or improvement from which the injury flows may be abated. The test in *Troy v. Railroad Co.*, 3 Foster (23 N. H.) 83, 55 Am. Dec. 177, and a line of cases following that case is that:

“Whenever the nuisance is of such a character that its continuance is necessarily an injury, and where it is of a permanent character, that will continue without change from any cause but manual labor, then the damage is an original damage, and may be at once fully compensated.”

But the soundness of this rule has been criticised as not being supported by the best reason or by the weight of authority. This rule has the effect to license the maintenance of a continuous nuisance by payment of damages as for an original damage. In *Uline v. N. Y. Cent. & H. R. Co.*, 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661, where the damages were sustained from a diversion of surplus waters into the basement of plaintiff's house by a change in the grade of a street, it is said:

“What right was there to assume that the street would be left permanently in a negligent condition, and then hold that the plaintiff could recover damages upon the theory that the carelessness would forever continue? A municipality or a railroad corporation, under proper authority, may erect an embankment in a street; and, if the work be carefully and skillfully done, it cannot be made liable for the consequential damages to adjacent property. But, if it be carelessly and unskillfully done, it can be made liable. It may cease to be careless, or remedy the effects of its carelessness, and it may apply the requisite skill to the embankment; and this it may do after its carelessness and unskillfulness, and the consequent damages, have been established by a recovery in an action. The moment an action has been commenced shall the defendant, in such a case, be precluded from

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remedying its wrong? Shall it be so precluded after a recovery against it? Does it establish the right to continue to be a wrongdoer forever by the payment of a recovery against it? Shall it have no benefit by discontinuing the wrong? And shall it not be left the option to discontinue it?"

The Supreme Court of Alabama in a recent case, which was an action for damages for the overflow of plaintiff's land, caused by the defendant's obstructing the natural flow of the waters in a creek, said:

"Further, if the proof shows with reasonable certainty a wrong by which the value of property is affected, permanent and unabatable in law or in fact, damages should be allowed for the whole injury, past and prospective; otherwise, successive actions are to be maintained. And this alternative the courts incline to favor, to the end that the defendant may not acquire the right to continue the wrong on the one hand, and, on the other, that he may have a *locus poenitentiae*, and be not compelled to pay for a permanent wrong to which he would put an end, perhaps, once it is adjudicated to be a nuisance. This conclusion is supported by the weight of reason and authority." (*Gloss-Sheffield Steel & Iron Co. v. Mitchell*, 161 Ala. 278, 49 South. 851.)

In case of doubt respecting the character of the injury courts are inclined to favor the right to bring successive actions, and therefore hold that the injury is not permanent. Section 1039, Sutherland on Dam.; *Schlitz Brewing Co. v. Compton*, 142 Ill. 511, 32 N. E. 693, 18 L. R. A. 380, 34 Am. St. Rep. 92; *City of Nashville v. Comar et ux.*, 88 Tenn. 415, 12 S. W. 1027, 7 L. R. A. 465. In the last-mentioned case the opinion, which was delivered by Lurton, J., now Associate Justice of the Supreme Court of the United States, ably reviewing the entire question and the diverging cases thereon, concludes with this language:

"It seems to us that the true rule deducible from the authorities is that the law will not presume the continuance of a wrong, nor allow a license to continue a wrong, where the cause of the injury is of such a nature as to be abatable either by the expenditure of labor or money; and that, where the cause of the injury is one not presumed to continue, the damages recoverable from the wrongdoer are only such as have accrued before action brought, and that successive actions may be brought for the subsequent continuance of the wrong or nuisance."

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In that case, as in the case at bar, the damages sought to be recovered resulted from the negligent construction of a sewer, wherefrom, in times of unusual freshets, waters were discharged upon the premises of plaintiff. An instruction of the trial court authorizing a recovery for depreciation in the value of the freehold was held erroneous.

In *Railway Co. v. Cook*, 57 Ark. 387, 21 S. W. 1066, it is said:

"If all damages that may ever result from the nuisance are in law the result of its construction as an original wrong, then everything that is a damage in legal contemplation, whether for past or prospective losses, is recoverable in one action; but if the wrong be continuing, and the injuries successive, the damage done by each successive injury may be recovered in successive suits, and the injury to be compensated in the original suit is only the damage that has happened."

In the case at bar, the city in grading its streets and constructing the sewers was acting within its lawful authority. Its wrong consists in negligently constructing the sewers with a capacity inadequate to carry off the surface waters which are collected from the courses in which they have flowed heretofore, and are brought to the point where the sewers are constructed to be discharged. If said sewers are enlarged or additional sewers built to carry off these waters, then no further injury will result to plaintiff; and it cannot be presumed that the city, upon its having been determined that the collection of the waters at the point near plaintiff's property and the negligent construction of said sewers to carry it off is unlawful, will not remedy the same so as to prevent further injury. To permit plaintiff to recover for future loss, which will not occur if the defects in the construction of said sewer are corrected, would be unjust to the city. On the other hand, to measure plaintiff's damages by only the depreciation in the value of his property that has occurred up to this time, when subsequent overflows may have the result to entirely destroy the value of his property, for which no action would lie to recover for such injury, because barred by the present action, would make the establishment of plaintiff's damages in the instant case a hazardous undertaking to him. The instructions

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of the court should have defined the measure of plaintiff's damages to be the value of the property destroyed by the waters, the loss of rent resulting from his buildings being vacated for the period they were vacated, and the loss of rents occasioned by depreciation in the rental or usable value of the property accruing up to the time of the bringing of this action.

The judgment of the trial court is reversed and the cause remanded.

WILLIAMS, KANE, and DUNN, JJ., concur; TURNER, J., not participating.

STATE *ex rel.* MCINTOSH, County Attorney, v. PERKINS.

No. 4042. Opinion Filed January 21, 1913.

(129 Pac. 730.)

1. **MUNICIPAL CORPORATIONS—Councilmen.** Under the provisions of chapter 136, p. 316, Sess. Laws 1910-11, and the acts of which the same is an amendment, two councilmen are provided for each ward in all cities of the first class.
2. **SAME—Unexpired Term.** Where no election is held at the time fixed by law, a city councilman, appointed to fill an unexpired term, holds until his successor is duly elected and qualified.

(Syllabus by the Court.)

Error from District Court, Bryan County;

A. H. Ferguson, Judge.

Quo warranto by the State on relation of J. T. McIntosh, county attorney, against T. J. Perkins, counsel of the city of Durant. Judgment for defendant, and plaintiff brings error. Affirmed.

J. T. McIntosh, in pro. per.

S. H. Kyle, for defendant in error.

DUNN, J. This case presents error from the district court of Bryan county, and is an action in the nature of *quo warranto*, brought for the purpose of ousting the defendant in error, T. J. Perkins, from the office of councilman of the second ward of the city of Durant. Plaintiff in error, as plaintiff, stated in his peti-

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tion that the city of Durant was a city of the first class, and had been since statehood; that it contained four wards, and that T. J. Perkins and J. A. Moore were acting as councilmen from ward No. 2 thereof; that the said J. A. Moore was duly elected at the April, 1911, election, and that T. J. Perkins was appointed by the city council of the said city on the 27th day of September, 1911, to fill the unexpired term of B. A. McDaniel, who was duly elected in May, 1910; that no election was held for the selection of councilmen in the said city on the first Monday in May, 1912; and that said defendant in error had not been elected or appointed to fill the office now occupied by him since the date of his original appointment, and that the city of Durant had held several municipal elections since statehood, at which councilmen were elected. To the petition, defendant filed a general demurrer which, on consideration by the court, was sustained, and, from the judgment entered, this appeal has been prosecuted.

In this court, counsel for plaintiff in error insist that, if the city of Durant has held no election since statehood, it would be entitled to eight councilmen instead of four; but that in view of the fact that elections had been held at which councilmen had been elected, under the provisions of chapter 136, p. 316, Sess. Laws 1910-11, the number of councilmen in cities of the first class was limited to four instead of eight. And it is also argued that the defendant in error could not continue to hold under the appointment which he had, because he was appointed to fill only the unexpired term, which ended the first Monday in May, 1912. In neither of these contentions are we able to agree.

In order to fully understand the force and effect of the act cited and relied upon by plaintiff in error, it is necessary to consider the previous acts and their amendments. The Legislature of 1909, in an act approved March 13, 1909, Sess. Laws 1909, p. 262, art. 2, c. 16, provided for elections in cities, towns, and villages of the state; the manifest purpose of which act being to make uniform, in cities of the state located in the different portions thereof, formerly known as Oklahoma and Indian Territories, the election and number of city officials. This act was afterwards amended by an act approved March 24, 1910, c.

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92, p. 178, Sess. Laws 1910. In this act, and under section 1 thereof, there is a provision validating and legalizing acts of those members of administrative boards of cities and villages where two members from each ward had not been previously elected, as provided for by Sess. Laws 1909, *supra*. This same proviso is contained in chapter 136, p. 396, Sess. Laws 1910-11, upon which plaintiff in error relies, manifesting an intent throughout all of this legislation that, in the different wards in the cities of the first class, two councilmen should be elected. The different acts, as amended and as finally completed, cover several pages of the Session Laws, and it is not deemed necessary, for the consideration of this case, to set them out at length; but a careful reading and consideration of the terms and purposes of the legislation, covering this entire subject, leaves no doubt of the intent of the Legislature in reference thereto, and we therefore hold, in accord therewith that, in cities of the first class under these acts, each ward is entitled to two councilmen.

On the other question, it appears T. J. Perkins, defendant in error, was appointed September 27, 1911, to fill the unexpired term of B. A. McDaniel, who was elected in May, 1910. Counsel's insistence on this point is that, in view of the fact that B. A. McDaniel's term would have expired in May, 1912, and that the city held no election at that time, therefore the defendant's term expires of that date. Counsel have cited no authorities on this question, but an investigation thereof convinces us that defendant in error accepted his appointment just as his predecessor accepted his election, and that he holds the office under his appointment, until his successor is elected and qualifies, notwithstanding the fact that an election provided for by the statute may have failed in being held.

A case very much in point on this proposition is that of *People v. Hardy*, 8 Utah, 68, 29 Pac. 1118. In this case it appeared that under section 2018, Comp. Laws of Utah 1888, there was a provision that the qualified electors should in 1878, and biennially thereafter, elect a collector for each county whose term of office should be for two years, or until his successor was elected and qualified. Under section 2020, *Id.*, it was pro-

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vided that, in case the said office became vacant, the county court should have the power to fill such vacancy by appointment until the next general election. In 1886 the county court, acting under this provision, appointed the defendant to fill a vacancy in the office of collector; and, at elections held in 1887 and 1889, this appointee, whose name was upon the ticket, was voted for and declared elected to the said office. No election was held in 1888 or in 1890, and, on *quo warranto* being brought to challenge his right to hold the office, the Supreme Court of Utah held that the elections for this office, held in 1887 and 1889, were nullities, and that, as no elections were held at the time fixed by law, the incumbent held under his appointment. The court, discussing the case, says:

"There can be no actual vacancy as long as the rightful occupant continues to hold office—that is, until death, resignation, removal, or some legal disability occurs. This provision is a proper one, and is so provided in order that vacancies in office may not occur from a failure of the people to elect at the regular general election fixed by the statute for that purpose. The result necessarily follows that a failure to elect at a period fixed by the statute creates no vacancy in the office, but imposes a right and a duty upon the incumbent to continue in office until his successor is legally elected and qualified; and this right falls upon the incumbent the same, whether appointed or elected. In other words, a person appointed to fill a vacancy in the office of collector can only be superseded by one who is duly elected, the person so appointed continuing to hold office in the same manner as if he were originally the incumbent; and his term of office will not expire until he is suspended by death, resignation, removal, or some other legal disability occurs, or until his successor is duly elected and qualified."

This case has been approvingly cited and followed in the following cases: *State ex rel. v. Elliott*, 13 Utah, 471, 45 Pac. 346; *State ex rel. v. Henderson*, 4 Wyo. 535, 35 Pac. 517, 22 L. R. A. 751; *State ex rel. v. Acton*, 31 Mont. 37, 77 Pac. 299; and *State ex rel. v. Schroeder*, 79 Neb. 759, 113 N. W. 192.

From the foregoing, it follows that the judgment of the trial court must be affirmed.

HAYES, C. J., and WILLIAMS and KANE, JJ., concur;
TURNER, J., absent, and not participating.

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HUGHES *et al.* v. GARRELTS *et al.*

No. 4072. Opinion Filed October 15, 1912.

Rehearing Denied January 21, 1913.

(129 Pac. 43.)

RECEIVERS—Appointment—When Authorized. Under section 5772, Comp. Laws 1909, where a party moving for a receiver shows that he has a probable cause of action, and that the rents, issues, and profits of the land in litigation are being removed, or there is danger of the same being lost, it is proper and right that the appointment should be made to hold them and prevent loss during the pendency of the litigation, and this without reference to the probable solvency or insolvency of the party against whom the proceedings are brought.

(Syllabus by the Court.)

Error from District Court, Okmulgee County;
Wade S. Stanfield, Judge.

Action by Enoch H. Hughes and others against Carson H. Garrelts and others. Judgment for defendants, and plaintiffs bring error. Reversed and remanded, with instructions.

Wood & Witten, E. J. Smith, and Cottingham & Bledsoe,
for plaintiffs in error.

Belford & Hiatt, for defendant in error Skelton.

R. T. Potter and Stanford & Cochran (C. B. McCrory,
of counsel), for defendants in error.

DUNN, J. This case presents error from an order of the district court of Okmulgee county denying application of plaintiffs in error and certain interveners for the appointment of a receiver to take, receive, and hold certain profits and rents pending litigation over the title of the land involved, until the determination thereof may be had. The petition was filed on the 12th day of April, 1912, and is in form an ordinary action in ejectment, except that it sets forth the manner in which the plaintiffs derived their title, including the Creek law of descent and dis-

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tribution, and prays for possession, damages, rents, and profits. In the second count thereof it is averred that the lands are oil lands, and that the defendants have developed the same for oil and gas and have produced large amounts therefrom, and are continuing to do so. The prayer is that plaintiffs' title be quieted and an account be taken of the oil and gas produced, and for general relief. The interveners, likewise claiming an interest in the property, joined in the application for a receiver. All of these parties claim as heirs of Moses Hughes, and of Jimmie P. Hughes, the latter of whom was an allottee of the Creek Nation. The defendants filed answer in which they deny plaintiffs' rights and aver that they are developing and operating the premises for oil and gas under a good and valid oil and gas lease, and denying that the corporation to which they are running the oil is of doubtful solvency, and aver that the same is able to respond in damages.

The evidence showed that between January 10, and May 10, 1912, oil had been run to the value of about \$40,000, more than \$30,000 of which had been paid to the defendants. Oil at the time of the trial was being produced at the rate of about 1,000 barrels a day, and was of the value of about 68 cents per barrel. The defendants made no showing, and the record contains none, of any right, title, or interest which they may have in and to the land, except it appears that L. S. Skelton, one of the defendants, executed a lease to the Okmulgee Gas Company, dated November 30, 1910, and the said company executed an assignment thereof to L. S. Skelton December 22, 1911. But little, if any, question is raised in this proceeding as to the title which plaintiffs and interveners assert. This question, however, is not before us for determination, nor was it necessary in order to qualify plaintiffs and interveners to be heard, for them to show that they had an absolute title to the land. The statute under which the proceeding is brought (section 5772, Comp. Laws 1909) reads as follows:

"A receiver may be appointed by the Supreme Court, the district court, or any judge of either, or in the absence of said judges from the county, by the probate judge: First, in an action by a vendor to vacate a fraudulent purchase of property, or by a

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creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed or materially injured."

By the foregoing it is seen that, where interest in property or fund or the proceeds thereof is probable, and where the property is being removed or is in danger of being lost, this is sufficient. *Willard Oil Co. v. Riley et al.*, 29 Okla. 19, 115 Pac. 1103. The evidence discloses that the oil which is being taken is being exclusively delivered to a concern called the American Refining Company, of which the defendant Skelton was unable to say whether the same was a domestic or foreign corporation, and whose president resided in St. Louis, Mo. Under these circumstances, in our judgment the conclusion reached by the trial court denying the application for a receiver to receive and hold the proceeds of this property until the final determination of the action was error. Appellate courts are generally slow to disturb the conclusion reached in such cases by trial courts for the reasons set out in the case of *Willard Oil Co. v. Riley et al.*, *supra*, but in the present case, that plaintiffs' and interveners' rights and interests are probable is, from the showing made, beyond question, and the defendants made no showing of any kind or character disclosing that they possessed any interest whatever in this property further than that of having sunk oil and gas wells thereon for the purpose of enabling them to receive its products. In fact, from a reading of the record we are impressed that, viewing the magnitude of interests involved, they have not dealt with entire frankness with the court. It is almost, if not quite, patent that the purpose animating them has been that of delay and to secure as speedily as possible the entire product, for when the Prairie Oil & Gas Company notified them that it would no longer make returns to them for oil run during the litigation, there was prompt change made from it to the present concern, which makes payment in full. It is true that this is explained on the theory that it was in consonance with a previous contract, but the fact remains as stated.

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Nor is it necessary, in order that plaintiffs be entitled to the relief demanded, that it be shown that the defendants or the concerns receiving the oil are insolvent. *Mead et al. v. Burk et al.*, 156 Ind. 577, 60 N. E. 338.

A discussion of the principles involved is contained in the case of *Ulman v. Clark*, 75 Fed. 868, from the United States Circuit Court of West Virginia, wherein it is said:

"It is laid down as a general principle by all the authorities that, where a party moving for the appointment of a receiver exhibits an apparently good title to the property in controversy, and that there is an imminent danger of the loss of the profits and rents of the property, a receiver may be granted for the preservation of the rents and profits *pendente lite*. High, Rec. sec. 576, and the cases there cited. And such I understand to be the law as laid down in Beach on Receivers. It is not alleged in this bill that the defendants to this action are insolvent at this time, or that there is a mismanagement of the property. On the contrary, it is conceded in the bill that there is no desire to take the property out of the hands of the parties who are operating it. The only purpose and object of this proceeding is to husband the rents and profits of this property pending this litigation, so that they may be turned over to the rightful owner of this property at the termination of it. This proceeding is in the nature of an ancillary proceeding to the action at law, and has for its one object and purpose the protection of the issues of this property. As we have seen, this application does not contemplate the change of the status of the realty itself. On the contrary, it is conceded by the bill that those who are operating the property as lessees should not be disturbed in their operations. If this motion contemplated the change of the possession of this property, it would involve a far different question than the one involved in the issue upon this motion. Numerous and various authorities have been cited by the defendants to show that the courts of equity will not entertain a motion to disturb the possession of a property pending a litigation in an action of ejectment; but such is not the motion in this case, and I do not see any valid reasons for refusing the motion asked for. There appears to be no desire upon the part of the plaintiffs to this action to interfere with the possession of the lessees of the property, but only, as I have said, to bring into the custody of the court the rents, issues, and profits of it, that they be husbanded and held to answer the judgment at the end of the litigation of the action at law. It is said that the granting of this motion would affect

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the rights of the shareholders in this association, by depriving them of the revenues arising from the operation of the mines upon the land in controversy. This may be so, but is a court of equity to deny the right of parties to invoke its aid to preserve the rents and issues of a property which may be dissipated and scattered, and which may never be gathered together so as to respond to a judgment at law when obtained? Should a court permit parties who are scattered over the country—some in foreign countries, as appears in this case—to carry off the revenues arising from the rents and profits of this land, and turn over to the plaintiffs, if they obtain a judgment at law, a series of vexatious lawsuits to enable them to assert their judgment? Or, rather, is it not the duty of a court of equity, under such circumstances, to have the rents, issues, and profits in its custody, so that at the end of the litigation it may turn them all over to the rightful owner? It may be inconvenient to, and may work a hardship upon, the shareholders in this case; but a court of equity must look to the merits and the rights of the parties involved in the questions before it for consideration, and not to the hardships that may be the result of its action in reference to the legal rights of the parties concerned. * * * There is no effort or desire upon the part of the plaintiffs to this action to interfere with the subject-matter of the litigation in the ejectment case by the appointment of a receiver; but it is for the purpose of preserving from waste, loss, and destruction the rents and profits arising out of the property, so that they may, in the language of the chancellor in the Chase case found in [1 Bland (Md.) 206] 17 Am. Dec. 277, 'harvest and gather the fruits until the labors of the controversy are over.' It is clear to my mind that the plaintiffs have probable cause of action against these defendants, and that the benefit to be derived from such cause of action might be lost if a receiver was not appointed, and it is no answer to this position that these parties are responsible at this time."

The purpose of this proceeding is not to deprive the defendants of either the possession of the land or of the right to continue operation, but it is its purpose to see to it that the oil and gas produced goes to the one who is entitled thereto, and not those who are not entitled to it, and this cannot be determined until the final trial of the main action. That it is proper and right to thus hold the proceeds we think there can be no doubt. It will bring no substantial harm to any one and will be absolutely conducive to justice to all.

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We have carefully considered all of the objections and contentions urged by counsel for defendants, but find the same not sufficient to overcome the manifest equities shown by plaintiffs and interveners.

The order of the trial court, therefore, denying the application for a receiver, is set aside and reversed, and this cause is remanded, with instructions to enter one in accord with this opinion requiring him to demand and receive of the defendants and them to deliver the net proceeds of oil and gas produced on this land from the date of the institution of the original action and defendants to continue to deliver and him receive and hold the same subject to the final judgment in the case.

TURNER, C. J., and WILLIAMS and KANE, JJ., concur; HAYES, J., absent, and not participating.

COOMBS *et al.* v. COOK.

No. 1945. Opinion Filed December 3, 1912.

Rehearing Denied January 28, 1913.

(129 Pac. 698.)

1. **EVIDENCE—Adoption—Best Evidence.** Where, under provisions of a statute, an adoption is effected by order or decree of the court, the records of such court constitute the best evidence by which such adoption may be established.
2. **SAME—Loss of Record.** Where the records of the court have been destroyed by fire, proof of the contents of such records by parol testimony may then be made, and circumstantial evidence introduced, including acts and declarations of an adopting parent, relative to such adoption, for the purpose of establishing the adoption.
3. **ADOPTION — Parol Evidence — Sufficiency.** Where many years have elapsed since an adoption proceeding was had, and the records of the court have been destroyed by fire, during which time the judge of the court and the clerk thereof have died, proof by a witness that he was present in court at the time of the proceeding, handed the petition for adoption to the judge, heard the order of the court thereon made, and, after the petition and order had been spread of record, read the same, and that it decreed an adoption of the child, and where proof established that the child lived from said time, until the death of the adopting parent, with the

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adopting parent, was recognized by the adopting parent as her child, and was referred to by her as her adopted child, and where the jurisdictional facts appear, a finding that the adoption occurred, in the absence of any contrary evidence, should be sustained.

4. **APPEAL AND ERROR—Change of Theory.** One who has tried his case in the trial court upon one theory, and lost, will not be permitted on appeal to this court to change front and try to prevail upon a different theory.

(Syllabus by the Court.)

*Error from District Court, McCurtain County;
D. A. Richardson, Judge.*

Action by Leslie Coombs and L. D. Owsley against Betsy Cook, *nee* Durant. Judgment for defendant, and plaintiffs bring error. Affirmed.

Montgomery & O'Meara, for plaintiffs in error.

Spaulding & Carr, for defendant in error.

HAYES, J. Plaintiffs in error brought this action in the court below to quiet title to an undivided half interest in a certain tract of land consisting of 225 acres, situated in McCurtain county in this state, and to obtain a decree of partition. They allege in their petition in the court below that the land in controversy was originally allotted by one Isabel O'Bannon, a member of the Choctaw tribe of Indians by blood, who, after taking said allotment, died in the month of March, 1907. She left surviving her no children, no brothers or sisters, and neither father nor mother. She died intestate, and left surviving her husband, Jack O'Bannon, and one niece and one nephew, to wit, Mary and Alfred James, who are the children of a deceased brother, and five children of a deceased sister. Plaintiffs allege that, by virtue of a conveyance from the nephew and niece of the deceased brother, they are the owners of the undivided half interest in Isabel O'Bannon's allotment, and that the five children of decedent's deceased sister are the owners of the other half interest. All of said children are made parties to this proceeding. They allege further that Jack O'Bannon, the husband of deceased, is claiming to hold said land by virtue of some conveyance from one Betsy Cook, who claims some title and interest

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therein, but allege that neither Jack O'Bannon nor Betsy Cook have any interest or title whatever in said land, and pray that Jack O'Bannon and Betsy Cook be required to plead whatever title or interest therein they claim.

Defendant Jack O'Bannon, by his separate answer filed, makes only the following claim of interest in the land: He alleges that he and Isabel O'Bannon lived together as husband and wife until her death, and during said time resided upon the land in controversy; that he cleared up some of the land and put a portion thereof in cultivation, and put other valuable and lasting improvements thereon; that he is now in possession of the land, and has not received any pay for the improvements, and he asks that it be decreed that he has a lien on the lands for the value of the improvements. By agreement of the parties, his claim is eliminated from the case until the issues between the other parties are disposed of.

Defendant in error, by her separate answer, alleges that she is the sole owner in fee simple of the lands in controversy by reason of the fact that the said Isabel O'Bannon, in the year 1892, duly adopted her (the said Betsy Cook) as her child; that such adoption was made in the county court of Towson county, Choctaw Nation, which was a court of record; that she is a citizen of the Choctaw Nation; that all the records and written evidence of said adoption have been destroyed and are beyond the reach, and cannot be secured by her; but that she would offer testimony at the trial to prove such adoption. Upon these facts she alleges that she is the sole heir of Isabel O'Bannon, and asks for a decree against the plaintiffs and her co-defendants, adjudging her the owner of the title to the land, subject to whatever equities, if any, the defendant Jack O'Bannon may have. The other defendants made no answer and filed no other pleading of any character.

The case was tried to the court without a jury. Before any evidence was heard, the following stipulation was made in open court:

"For the purposes of this trial, it is stipulated in open court between attorneys for the plaintiffs and the attorneys for Betsy

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Cook that the land in controversy was the allotment of Isabel O'Bannon, who was enrolled as a full-blood Choctaw, and who died intestate in McCurtain county. It is further stipulated that the defendant, Betsy Cook, formerly Betsy Durant, is enrolled opposite enrollment No. 2083 as a full-blood Choctaw, and said certificate is made a part of this stipulation. It is further stipulated that Davis James, Rachel James, and Margaret Keel have conveyed to the plaintiffs their interest in the land described in this petition, which interest depends on the ascertainment of the question of adoption in this case. It is further stipulated that the only issue of law and fact between the defendant, Betsy Cook, and the plaintiffs is the fact and sufficiency of the adoption pleaded as a separate answer of Betsy Cook."

The trial court found the issues generally in favor of Betsy Cook and against the plaintiffs, and found specially that Isabel O'Bannon was a Choctaw Indian, and that in the year 1892 she adopted Betsy Cook, as alleged in her answer, in accordance with the laws of the Choctaw Nation; that she died in March, 1907, after having taken as her allotment the land in controversy; that she left surviving her as her kinsmen only the persons named in plaintiffs' petition; and that Betsy Cook, as her legally adopted child, is the sole and only heir to her estate, and rendered judgment in her favor accordingly, from which judgment only plaintiffs in error, plaintiffs below, prosecute this appeal.

All of defendant's evidence, by which the fact of her adoption was established, was parol evidence, made after proof that the records of the court in which the order of adoption was made had been destroyed. Plaintiffs rely for reversal of the cause upon four contentions: First, that the evidence fails to establish that there was ever a record in any court that had jurisdiction; second, that, if such record ever existed, the evidence does not establish that it is lost and can not, by the exercise of proper diligence and search, be found; third, that the contents of such record has not been shown; fourth, that, if the evidence establishes an adoption under the laws of the Choctaw Nation, the statutes of that nation, in so far as made part of the evidence at this trial, fail to show that an adoption of a child has the effect to confer upon it the right to inherit from the adopting parent. The first three of these contentions may be discussed together.

Defendant in error pleaded in her answer and proved the following tribal statute of the Choctaw Nation:

"Any person or persons who may wish to adopt an illegitimate or orphan child or children shall file a petition to that effect with the clerk of the county they may reside in, which shall remain on file for 30 days; and, if no legal or just cause is shown why the petition shall not be granted, then the county judge shall grant the petition and cause the same to be recorded in the county clerk's office, after which the adoption shall be as binding as if done by special act of the general council."

Where, under the provisions of the statute, an adoption is effected by an order of the court, the records of such court constitute the evidence by which such adoption may be established. *Quinn v. Quinn*, 5 S. D. 328, 58 N. W. 808, 49 Am. St. Rep. 875.

In the absence of proof of such order of adoption by the court, as provided by the statute, no presumption of adoption will arise from the fact that a child has lived with a person, who is not his parent, and has been treated as a child; but, where the records of the court or the adoption papers have been destroyed or lost, proof of the contents of such records or papers by parol testimony then may be made, and circumstantial evidence, including acts and declarations of the adopting parent relative to such adoption, may be admitted. *Haworth v. Haworth et al.*, 123 Mo. App. 303, 100 S. W. 531; *Moore et al. v. Bryant*, 10 Tex. Civ. App. 131, 31 S. W. 223; *Kennedy v. Borah*, 226 Ill. 243, 80 N. E. 767.

All the evidence relative to defendant's adoption is practically uncontroverted by plaintiffs. The evidence establishes that she is an illegitimate child of a woman who was killed while defendant was a very small infant; that defendant was taken by Isabel O'Bannon, when defendant was between one and two years of age; that she constantly lived with Isabel O'Bannon until the death of Isabel O'Bannon; that during all of this time she was treated by deceased as her child, and deceased had at different times made statements that she was her adopted child. All the evidence establishes that both defendant and Isabel O'Bannon, since the birth of the former, have continuously resided in Towson county of the Choctaw Nation until the admission of the

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state, at which time the territory constituting that county became part of Choctaw county of this state. The exact date when the order of adoption was made by the tribal county court is not clear; but all the evidence places it somewhere between the first part of the year 1892 and the early part of the following year. One witness by the name of Wilson, who was district judge of the Choctaw Nation for Towson county at the time of the admission of the state, testifies that he had resided in Towson county during his entire life; that in 1892 and 1893 his father was county judge of said county; that he had been familiar with the records and affairs of the county court of that county; that the records of that court, made from 1890 to 1894, were burned; that the county clerk kept said records at his home, as there was no office for them to be kept in at the time; and that the clerk's residence was burned and the records of the court destroyed, so that they were never brought back to court. He did not remember the exact date of the fire, but that it occurred along about 1894 or 1895. During this time Henry Williams was clerk of the county. Both he and the judge of the county court at the time of the adoption proceeding have been dead for a number of years. Another witness, who for a number of years was an officer of Towson county, either in the capacity of sheriff, deputy sheriff, or special ranger, testifies also that the records of the county court during the years 1892 and 1893 were burned up; the exact date of the fire he could not give, but thought it was about the year 1897, which date he fixed by the fact that on the 1st day of October, 1898, he qualified as sheriff of that county. He testifies that, after the burning of the county clerk's residence, the records were never seen by any one. The same witness testifies that he had known both defendant and Isabel O'Bannon practically ever since the birth of defendant. During the greater portion of said time, he has lived near them. He was in court in the early part of 1892, when Isabel O'Bannon handed to him a petition for the adoption of defendant as her child, which witness, upon request of Isabel O'Bannon, handed to the court. Witness did not read the petition then, but did so after it had been spread upon the records of the court. He was present when the court

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announced its order permitting the adoption, and afterwards read the order of adoption upon the records of the court. He could not remember all the contents of the record, but does remember that it provided that: "The adoption of such child to be accepted as the adopted child of Mrs. O'Bannon. The proceeding was complete of the adoption of this child, Betsy Durant, to Mrs. O'Bannon." The same witness testifies that, during her entire life thereafter, Isabel O'Bannon treated defendant as her child, and stated that she had adopted her, and that the child would inherit everything she left at her death. Other witnesses testified that they were present in court when a petition for the adoption was presented, and when an order was made thereon. None of them had read the order as entered upon the records of the court and was able to testify as to the contents of the record; but all the evidence tends to corroborate the testimony of the one witness who testified that he read the order, and that it did decree an adoption.

We think the foregoing evidence sufficient to establish the existence of the record of adoption and the contents thereof. It is true that defendant does not show that she has made any search for such record; but the evidence of the foregoing mentioned witnesses, to the effect that the records were burned, is corroborated by other evidence. One witness who had married about the time this adoption occurred, testified that he had made a search for the records of the office in order to obtain a copy of his marriage license, and had been unable to find the records; that they had been burned. It is true that secondary evidence as to the contents of records or written instruments is not admissible as a general rule, without a showing, on the part of the person offering such evidence, that he has made a diligent effort to locate the written record or instrument, and has been unable to do so because of the fact they are lost or destroyed, but the law does not require a useless thing; and, where the evidence is sufficient that the record or written instrument has been destroyed by fire, there can be no reason or good purpose subserved by requiring the person offering secondary evidence thereof to make search for such destroyed instrument or record. The evidence

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does not harmonize in all of its details, such as the exact date of the adoption and the date of the fire; but there is nothing surprising about this, when it is considered that all these transactions occurred from fifteen to twenty years ago, and among a class of people whose form of government and records thereof were crude, and who were without local newspapers to chronicle local court events and to impress them generally upon the minds of the people.

The fourth contention made by plaintiffs in error does not seem to have been presented to the trial court, and it is stated by counsel for defendant in error, and not denied by plaintiffs in error's counsel, that the trial in the lower court proceeded upon the theory that, if the fact of adoption was established, defendant in error, under the law, inherited as sole heir the land in controversy. What effect an adoption under the statute has upon the right of an adopted child to inherit from its adopting parent is not disclosed by the foregoing statute pleaded and proved, which states that adoption made in county courts shall be as binding as done by special act of the general council. It is well settled that the rights of an adopted child to inherit are determined by the statute under which the adoption is made; and some of the authorities hold that such statutes are to be strictly construed against the right of inheritance. 1 Cyc. 932. This court does not take judicial knowledge of the tribal laws of the Five Civilized Tribes of Indians; and, where they are relied upon to establish a right, they must be pleaded and proved (*Bruner v. Sanders*, 26 Okla. 673, 110 Pac. 730); and we cannot therefore look to the tribal laws, as published, for additional light upon the question of whether, under such law, defendant in error, by reason of her adoption, became the heir of Isabel O'Bannon; but the statement of her counsel that the case was tried upon the theory that such was the effect of an adoption, assuming the adoption to have been made, is supported by the record in this case and by the stipulation made in open court set forth above in this opinion. This stipulation was dictated in open court by counsel for plaintiffs in error, and specifically provides:

"It is further stipulated that the only issue of law and fact between the defendant, Betsy Cook, and the plaintiffs is the fact

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and sufficiency of the adoption pleaded as a separate answer of Betsy Cook."

It is well settled that one may not try his case before the court upon one theory, and, having lost there, shift to another theory in this court on appeal. *Hamilton v. Brown*, 31 Okla. 213, 120 Pac. 950; *Smith v. Colson*, 31 Okla. 703, 123 Pac. 149. The wisdom and justice of this rule finds exemplification in this case, for defendant no doubt relied upon the assumption of all the parties that, if she was able to show that she had been adopted, she was the only heir of deceased, and therefore undertook to introduce no more of the tribal statutes than was necessary to establish the adoption; for the introduction of any of such tribal statutes under the issues as defined by the stipulation, and under the theory upon which the trial of the case proceeded, would have been wholly unnecessary and immaterial.

The judgment of the trial court is accordingly affirmed.

TURNER, C. J., and WILLIAMS, J., concur; KANE and DUNN, JJ., absent, and not participating.

MUSKOGEE ELECTRIC TRACTION CO. v. REED.

No. 1973. Opinion Filed January 28, 1913.

(130 Pac. 157.)

1. **APPEAL AND ERROR—New Trial—Presenting Questions in Trial Court—Motion for New Trial—Discretion of Court.** Errors alleged to have occurred at the trial in the lower court, unless the same are excepted to and thereafter assigned in the motion for a new trial and made a part of the record by means of case-made or bill of exceptions, will not be considered on review in this court.
 - (a) When no exceptions are saved to alleged errors occurring during the trial, though assigned in the motion for a new trial as grounds therefor, said motion is merely addressed to the discretion of the trial court.
2. **SAME—Questions of Fact.** Where the plaintiff permits issues joined to be submitted to the jury upon the evidence without objection and exception, the verdict on review in this court is conclusive, so far as such evidence is concerned, except as to "excessive damages, appearing to have been given under the influence of passion and prejudice."

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3. **DAMAGES—Elements of Compensation—Personal Injuries.** In an action to recover damages for injury to the person, the plaintiff is entitled to recover the expenses of the cure, or reasonably attempted cure, the reasonable probable cost of the future treatment or nursing, when the injury is permanent or irremediable, and the loss of time up to the verdict, and reasonable probable future loss from incapacity to do as profitable labor as before, and pain and suffering proximately caused by the injury.

(Syllabus by the Court.)

*Error from District Court, Muskogee County;
John H. King, Judge.*

Action by Barbara Reed against the Muskogee Electric Trac-
tion Company. Judgment for plaintiff, and defendant brings
error. Affirmed.

N. A. Gibson and H. C. Thurman, for plaintiff in error.

Hutchings & German, for defendant in error.

WILLIAMS, J. This proceeding in error is to review the judgment of the trial court, wherein the defendant in error, as plaintiff, sued the plaintiff in error, as defendant, to recover the sum of \$5,000 for damages on account of personal injuries alleged to have been occasioned by the negligence of the defendant. The parties hereto will be herein referred to in the order in which they appeared in the trial court. On March 14, 1908, the plaintiff, accompanied by her daughter, Lucile Pagett, who carried her baby in her arms, approached a west-bound electric street car of the defendant on Broadway in the city of Muskogee. Said car stopped east of the east line of Third street; the front end being about on a line with the sidewalk on the east side of Third street. The pavement on Third street was 30 feet wide, and the car 27 feet long. The plaintiff boarded the rear platform of said car, and, some time after she had both feet on the platform, the car was started. After it had proceeded in a westerly direction across an intersecting track running north and south in the center of Third street, the plaintiff fell from the car, striking the pavement on her feet, which turned under her, causing the injuries for which a recovery herein is sought. She fell facing in a southerly direction, with her

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head toward the west and her feet toward the east. Just before falling she was not holding to anything, and was unable to catch to anything whilst falling. At that time the car was moving very slowly, and proceeded not more than four or five feet from such place. As to the foregoing facts there was no conflict in the evidence. On the part of the plaintiff the evidence tended to show that when she fell from the car she was reaching for the baby in the arms of her daughter, who was standing on the pavement, for the purpose of taking it on the car. Neither the sufficiency of the evidence to warrant a recovery in favor of the plaintiff being challenged by demurrer thereto nor motion for a directed verdict, the cause was submitted to the jury under instructions, about which no complaint is made in this court.

After a verdict in the sum of \$5,000 was returned duly signed by nine of the jurors in favor of the plaintiff, a motion for new trial was filed in due time, assigning the following reasons why the same should be granted: (1) Verdict contrary to the law; (2) contrary to the evidence; (3) excessive; (4) due to prejudice and passion of the jury against the defendant; (5) not by a lawful jury. The only grounds presented in the brief are that: (1) The verdict is not supported by sufficient evidence; and (2) the same is excessive.

It is well settled in this jurisdiction that errors occurring at the trial, not excepted to, will not be reviewed on appeal. *Saxon v. White*, 21 Okla. 194, 95 Pac. 783; *Capital Fire Ins. Co. v. Carroll et al.*, 26 Okla. 286, 109 Pac. 535; *Burnett v. Durant*, 28 Okla. 552, 115 Pac. 273. A motion for a new trial is intended for the purpose of bringing to the notice of the trial court errors and exceptions saved during the trial. When no exceptions are saved during the trial such motion presents nothing relative thereto for review in the appellate court; it being addressed merely to the discretion of the trial court.

In *Schwinger v. Raymond*, 105 N. Y. 648, 11 N. E. 952, it is said:

"The court below had the power to set aside the verdict as contrary to the evidence without any exception, but in this court we can consider no objection which is not based upon some exception taken at the trial, and the appeal to this court from the

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order denying defendants' motion for a new trial brings here only questions of law based upon exceptions taken at the trial. Therefore, however unjust this verdict may be upon the facts appearing in the case, we are powerless on that account to give the defendant any relief."

See, also, to the same effect *Meyers v. Cohn*, 4 Misc. Rep. 185, 23 N. Y. Supp. 996.

The plaintiff having elected to submit the issues to the jury upon the evidence without objection and exception, the verdict is conclusive in this court, except upon the ground that it is excessive and due to prejudice and passion. *Morgan & Wright v. McCaslin*, 213 Ill. 358, 72 N. E. 1066; *Railway Co. v. Shaw*, 220 Ill. 532, 77 N. E. 139; *Stansifer v. Moser*, 42 S. W. 843, 19 Ky. Law Rep. 1022; *Wakely v. Johnson*, 115 Mich. 285, 73 N. W. 238; *Barrett v. Railway Co.*, 45 N. Y. 628; *Eckensberger v. Amend*, 10 Misc. Rep. 145, 30 N. Y. Supp. 915; *Paige v. Chedsey*, 4 Misc. Rep. 183, 23 N. Y. Supp. 879; *Nunn v. Bird*, 36 Ore. 515, 59 Pac. 808; *Frassett v. Boswell*, 59 Ore. 288, 117 Pac. 302.

The evidence shows that as a result of the injury sustained the plaintiff's right thigh was broken, being confined to her bed for eight and one-half weeks. Her hospital and doctor's bill amounted to \$304. The injury was a source of much pain and suffering. At the time of the trial she was walking on crutches, and complained of a great deal of pain, being unable to bear her weight on the fractured limb. One limb had become shorter than the other. The question of her ultimate recovery was problematical. Prior to the injury she had kept house, doing all of her work. Her two boys and married daughter lived with her.

"Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money which is called damages." (Comp. Laws 1909, sec. 2881.)

"Detriment is a loss or harm suffered in person or property." (Section 2882, *Id.*)

"Damages may be awarded in a judicial proceeding for detriment resulting after the commencement thereof, or certain to result in the future." (Section 2883, *Id.*)

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For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by said chapter, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not. These statutes seem to be substantially declaratory of the common law.

In *Choctaw, O. & G. R. Co. v. Burgess et al.*, 21 Okla. 653, 97 Pac. 271, an action arising under the laws in force in the Indian Territory, in which jurisdiction the common-law rule as to the measure of damages obtained, it was held that in an action to recover damages for injury to the person, the plaintiff is entitled to recover the expense of the cure, or reasonably attempted cure, the probable costs of the future treatment or nursing, when the injury is permanent or irremediable, and the loss of time up to the verdict, and probable future loss from incapacity to do as profitable labor as before, and pain and suffering proximately caused by the injury. In the same case it was further held:

"Appellate courts should sparingly exercise the power of granting new trials on the ground of excessive damages, and only when it appears that the verdict is so excessive as *per se* to indicate passion or prejudice."

In *Independent Cotton Oil Co. v. Beacham*, 31 Okla. 384, 120 Pac. 969, it is said:

"Compensatory damages is all the plaintiff is entitled to, and \$25,000, the amount of the verdict, to our mind, is clearly in excess of any sum that could properly be based solely upon the idea of compensation. The record is unusually free from errors, and there is nothing to indicate prejudice or passion on the part of the jury, except the size of the verdict, but we would be justified in inferring that there was prejudice and passion from the magnitude of the verdict. * * * It may be, however, that the jury was prejudicially influenced against the defendant by being permitted to take with them to the jury room for their consideration the second amended petition, answer, and reply, on which the case was tried. This often has been held to be error. * * * The pleadings, and particularly the petition, always set out the details of the injury with a harrowing particularity which is seldom entirely supported by the evidence, and the jury may unconsciously have been misled by the statements contained in the pleadings, instead of confining their deliberations to the evi-

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dence, as was their duty. With a verdict that satisfied the judgment of the court, and a record otherwise free from error, we would be loath to set aside the verdict upon the last ground, and will not do so if the plaintiff within fifteen days after the mandate is handed down files a *remititur* for all in excess of \$10,000."

In that case the plaintiff was about twenty years of age, by occupation a common laborer, and with an earning capacity of \$1.50 per day. If we were to conclude that the jury rendered an excessive verdict, in view of this authority, we would not reverse and remand the case, but order a *remititur*, in which event, if the same was made, the case would be affirmed; but it is not clear to our minds that the jury was not justified in returning this verdict in the sum stated.

It follows that the judgment of the lower court must be affirmed.

HAYES, C. J., and KANE and TURNER, JJ., concur;
DUNN, J., absent, and not participating.

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No. 2376. Opinion Filed January 28, 1913.

(130 Pac. 140.)

EXEMPTIONS—Piano—"Household and Kitchen Furniture." A piano comes within the term of "household and kitchen furniture," as the same is used in our personalty exemption statute (section 3346, Comp. Laws 1909; Sess. Laws 1905, p. 255).

(Syllabus by the Court.)

Error from District Court, Pottawatomie County;
Roy Hoffman, Judge.

Action by S. Cook against Mrs. B. A. Fuller. Judgment for defendant, and plaintiff brings error. Affirmed.

A. M. Baldwin and A. J. Carlton, for plaintiff in error.

Edw. Howell, for defendant in error.

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WILLIAMS, J. The only question for determination is as to whether a piano is included within the term of "all household and kitchen furniture."

Section 3346, Comp. Laws 1909 (Sess. Laws 1905, p. 255), is as follows:

"The following property shall be reserved to every family residing in the state exempt from attachment or execution and every other species of forced sale for the payment of debts, except as hereinafter provided: First, the homestead of the family, which shall consist of the home of the family, whether the title to the same shall be lodged in or owned by the husband or wife. Second, all the household and kitchen furniture. Third, any lot or lots in a cemetery held for the purpose of sepulture. Fourth, all implements of husbandry used upon the homestead. Fifth, all tools, apparatus and books belonging to and used in any trade or profession. Sixth, the family library and all family portraits and pictures, and wearing apparel. Seventh, five milch cows and their calves under six months old. Eighth, one yoke of work oxen, with necessary yokes and chains. Ninth, two horses or two mules, and one wagon, cart or dray. Tenth, one carriage or buggy. Eleventh, one gun. Twelfth, ten hogs. Thirteenth, twenty head of sheep. Fourteenth, all saddles, bridles and harness necessary for the use of the family. Fifteenth, all provisions and forage on hand, or growing for home consumption, and for the use of exempt stock for one year. Sixteenth, all current wages and earnings for personal or professional services earned within the last ninety days."

In *Alsop & Thompson v. Jordan*, 69 Tex. 300, 6 S. W. 831, 8 Am. St. Rep. 53, in an opinion by Mr. Justice Stayton, concurred in by Chief Justice Willie and Justice Gaines, the clause exempting "all household and kitchen furniture" was construed to include a piano. In the opinion he reviews *Tanner v. Billings*, 18 Wis. 163, 86 Am. Dec. 755, and points out that the conclusion of the court therein reached depended upon the particular provision of the statute, in that it, after naming certain specific articles of household furniture as exempt, further added, "all other household furniture not herein enumerated not exceeding \$200 in value"; and that, as a piano as a rule would cost in excess of \$200, obviously it was not the intention of the Legislature to include a piano in said exemption.

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In *Dunlap v. Edgerton*, 30 Vt. 224, a piano was held not to be "an article of household furniture necessary for upholding life."

In *Kehl v. Dunn*, 102 Mich. 581, 61 N. W. 71, 47 Am. St. Rep. 561, the clause exempting to each householder all household goods, furniture, or utensils not to exceed the value of \$250 was construed not to include a piano, citing as authority *Tanner v. Billings*, *supra*, and *Dunlap v. Edgerton*, *supra*.

In *Conklin v. McCauley*, 41 App. Div. 452, 58 N. Y. Supp. 879, in an opinion by Hatch, J., paragraph 4 of the syllabus is as follows:

"Replevin for a piano, which was seized under execution, and which plaintiff claimed as a part of her necessary furniture, under Code Civ. Proc. sec. 1391, exempting necessary furniture to the value of \$250, may be maintained without express proof of the value of other articles of furniture owned by plaintiff, where there was sufficient proof on the subject to justify a finding that the other articles were of little value."

In the opinion it is said:

"The proof given upon the trial tended to establish, and the jury were authorized to find, that the article in question constituted necessary household furniture, as it appeared that the plaintiff made use of the same in connection with the education of her children, and that the piano was an article of necessity for that purpose."

This opinion was concurred in by Goodrich, P. J., and Cullen, Bartlett, and Woodward, JJ. Cullen and Bartlett are now members of the Court of Appeals of said state; the former being Chief Justice.

Under the authority of the Texas and New York cases, the judgment of the lower court is affirmed.

All the Justices concur.

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No. 2890. Opinion Filed January 28, 1913.

(130 Pac. 134.)

APPEAL AND ERROR—Dismissal—Insufficiency of Record. A proceeding in error commenced in this court on a case-made, where it does not appear from the record or otherwise that the defendant in error was present, either personally or by counsel, at the settlement, or that notice of the time was served or waived, or what amendments suggested, if any, were allowed or disallowed, will be dismissed on motion of defendant in error. (Following *First Nat. Bank of Collinsville v. Daniels*, 26 Okla. 383, 108 Pac. 748.)

(Syllabus by the Court.)

*Error from District Court, Ellis County;
G. A. Brown, Judge.*

Action between Benjamin M. Flathers and Emily J. Flathers. From the judgment, Benjamin M. Flathers brings error. Dismissed.

C. B. Leedy, for plaintiff in error.

W. H. Springfield, for defendant in error.

WILLIAMS, J. The defendant in error has moved the dismissal of this proceeding in error, on the ground that the case-made was signed, as shown by the certificate of the trial judge, on July 14, 1911, when the notice served on said defendant in error, as the same appears in the record, stated that the same would be presented at the designated place for signing and settlement on July 15, 1911. Neither does the record disclose that any appearance on the part of the defendant in error was made, nor that any suggestions as to amendments were filed, for the purpose of having them incorporated in said record, and the record does not disclose that any amendments were allowed or disallowed.

In *Kansas City, M. & O. Ry. Co. v. Brandt*, 33 Okla. 661, 126 Pac. 787, the syllabus is as follows:

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"Where the certificate of the trial judge to a case-made fails to show that the case-made was signed and settled at the place designated in the notice to defendant in error as the place of signing and settling the same, and it is made to appear by the uncontroverted affidavit of defendant in error that he was present at the designated time and at the place designated in the notice during the entire day, for the purpose of urging the incorporation into the case-made of amendments theretofore suggested by him within the time allowed by order of the court, and that the case-made was not presented at such place on the designated date, the case-made will be held a nullity and the proceeding in error dismissed. * * *

See, also, *Lister et al. v. Williams*, 28 Okla. 302, 114 Pac. 255; *Harrison et al. v. Penny*, 28 Okla. 523, 114 Pac. 734; *First Nat. Bank of Collinsville v. Daniels*, 26 Okla. 383, 103 Pac. 748. All the Justices concur.

GRISSOM et al. v. BEIDLEMAN et al.

No. 3283. Opinion Filed December 31, 1912.

(129 Pac. 853.)

1. **INFANTS—Actions to Protect Real Estate—Services of Attorney —“Necessaries.”** Where suit was brought in the name of a minor, who was under the age of eighteen years, by direction of her next friend, to protect the infant's title to certain real estate, held, that counsel could not recover in an action at law against the minor for services in such suit.
(a) Such services are not regarded as necessities, and may be avoided by the infant, even under express promise.
2. **SAME—Disaffirmance of Contract.** The disaffirmance of a contract made by an infant nullifies it, and renders it void *ab initio*; and the parties are returned to the same condition as if the contract had never been made.
(a) After the infant has disaffirmed the contract, any one may take advantage of such disaffirmance.
3. **SAME—Avoidance of Contract.** An infant may avoid his act or contract by different means, according to the nature of the act and the circumstances of the case.
(a) Any act showing unequivocally a renunciation of, or a disposition not to abide by the contract made during minority is sufficient to avoid it.

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4. **APPEAL AND ERROR—Sufficiency of Petition—Errors Apparent of Record.** Upon a petition in error to reverse a judgment by default, such defects in the petition as could have been taken advantage of under general demurrer may be brought under review; and, if the allegations of the petition are insufficient to sustain the judgment, the same will be reversed.

(a) Where an error is apparent on the judgment roll or record of the trial court, the same will be considered on review here, although no exception was taken thereto.

(Syllabus by the Court.)

Error from District Court, Okmulgee County;
Wade S. Stanfield, Judge.

Action by George C. Beidleman and others against Joseph M. Grissom and others. Judgment for plaintiffs, and defendants bring error. Reversed and remanded, with instructions.

George James, for plaintiff in error Grissom.

A. S. McRea, for plaintiff in error Green.

Merwine & Newhouse and *George C. Beidleman*, for defendants in error.

WILLIAMS, J. The only question to be determined in this proceeding is whether the contract entered into, on which the action was based, to wit, that between Leah Gresham, a minor, under eighteen years of age, by Vassie Gresham, as next friend, and George C. Beidleman, an attorney, in which the latter was employed as attorney to prosecute an action in her name by said next friend to recover her interest in certain lands, was voidable.

“A minor cannot give a delegation of power, nor under the age of eighteen, make a contract relating to real property, or any interest therein, or relating to any personal property not in his immediate possession or control.” (Section 5035, Comp. Laws 1909; section 3912, Wilson’s Rev. & Ann. St. 1903.)

A minor may make any other contract, with certain exceptions; the exception including section 5035, *supra*, subject only to his power of disaffirmance, and subject to the provisions of the law on marriage and on master and servant. Section 5036, Comp. Laws 1909; section 3913, Wilson’s Rev. & Ann. St. 1903.

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"A minor cannot disaffirm a contract, otherwise valid, to pay the reasonable value of things necessary for his support, or that of his family, entered into by him when not under the care of a parent or guardian able to provide for him or them." (Section 5038, Comp. Laws 1909; section 3915, Wilson's Rev. & Ann. St. 1903.)

"A minor cannot disaffirm an obligation, otherwise valid, entered into by him under the express authority or direction of a statute." (Section 5039, Comp. Laws 1909; section 3916, Wilson's Rev. & Ann. St. 1903.)

In all cases other than those specified in said sections 3915 and 3916, Wilson's Rev. & Ann. St. 1903 (sections 5038 and 5039, Comp. Laws 1909), the contract of a minor, made by him whilst he is under the age of eighteen, may be disaffirmed by the minor himself, either before his majority or within one year's time afterwards, or in case of his death, by his heirs or personal representative; and if the contract be made by the minor while he is over the age of eighteen years, it may be disaffirmed in law only upon restoring the consideration to the party from whom it was received, or paying its equivalent, with interest. Section 5037, Comp. Laws 1909; section 3914, Wilson's Rev. & Ann. St. 1903. See *Crafts v. Carr*, 24 R. I. 397, 53 Atl. 275, 60 L. R. A. 128, 96 Am. St. Rep. 721; *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209; *International Land Co. v. Marshall*, 22 Okla. 693, 98 Pac. 951, 19 L. R. A. (N. S.) 1056.

The English law, from the earliest period, has thrown the mantle of protection around the minor or infant on account of his ignorance and inexperience. *International Land Co. v. Marshall*, *supra*. The federal government, in exercising its guardianship over the Indians as its wards, carrying out this same policy, has put certain limitations upon this state as to the lands of said wards. *Jefferson v. Winkler*, 26 Okla. 653, 110 Pac. 755; *Bell v. Cook* (C. C.) 192 Fed. 597; *Truskett et al. v. Closser* (C. C. A.) 198 Fed. 835.

In *N. H. Mutual Fire Ins. Co. v. Noyes*, 32 N. H. 345, it is said:

"In *Phelps v. Worcester*, 11 N. H. 51, it was holden that the services and expenses of counsel, in carrying on a suit to protect the infant's title to his estate, could not be regarded as neces-

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saries, and that the infant's liability for them might be avoided, even under an express promise to pay for them. Upham, J., in pronouncing the opinion of the court, remarked: "The inquiry has been made, if there had been no guardian, and the infant were without aid, whether he might not employ others to protect his rights to his property, and be legally holden, notwithstanding the interposition of his minority. We think clearly not. Though such services may promote the sound interests of the ward (infant?), they are not such assistance as comes within the term "necessaries." Lord Coke considers the necessities of the infant to include victuals, clothing, medical aid, and good teaching or instruction whereby he may profit himself afterwards. Coke Lit. 172a. Such aid concerns the person and not the estate, and we know of no authority which goes beyond this.' Now, if the services and expenses of counsel, in protecting the property of an infant, are not necessities, on what principle can it be contended that the insurance of that property against loss by fire can be? The object is the same in both cases—the protection and security of the infant's property—and instances can readily be conceived where the services of learned and experienced counsel might be quite as valuable and important as any contract of insurance. The test of beneficiality, then, cannot be relied on as determining whether or not a thing is to be reckoned among necessities. But it seems to us the suggestion in the case last cited, that necessities concern the person and not the estate, furnishes the true test on this subject. Although there may be isolated cases where a contrary doctrine has obtained, we apprehend the true rule to be that those things, and those only, are properly to be deemed necessities which pertain to the becoming and suitable maintenance, support, clothing, health, education, and appearance of the infant, according to his condition and rank in life, the employment or pursuit in which he is engaged, and the circumstances under which he may be placed as to profession or position. Coke Lit. 172a; *Whittingham v. Hill*, Cro. Jac. 494; *Ive v. Chester*, Cro. Jac. 560. If this be so, then matters which pertain only to the preservation, protection, or security of the infant's property are excluded from the list of necessities, however beneficial. Whatever relates to his property is the legitimate business of a guardian, and, if transacted by the infant, may be avoided at his election."

In *Barker v. Hibbard*, 54 N. H. 539, 20 Am. Rep. 160, this holding is adhered to, but counsel fee for defending the minor in

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a bastardy proceeding is classed as "a necessary"; the action concerning his person and liberty.

In *Thrall v. Wright*, 38 Vt. (Book 12, Ann. Ed. 188) 494, it is said:

"The defendant was a minor, had a note against his father, and employed the plaintiff, an attorney, to bring a suit on it against his father. The suit was afterwards discontinued. The boy told the attorney, when he applied to him to bring the suit, that he did not reside with his father, and that his father had given him his time. The father was a man of property, willing and able to support his son, and desired that he should remain at home. This suit is brought by the attorney to recover of the minor for his services and disbursements in the suit. The minor pleads infancy. The court below found that the suit was not necessary to protect the son's interest in the note, not beneficial to the minor, and not proper and expedient under the circumstances. (1) The plaintiff insists that in this finding there was error, and that, upon the facts disclosed in the case, the suit was necessary. Why? Not because the evidence did not tend to prove the fact that the suit was unnecessary, nor because the court exceeded their duty in finding the fact from the evidence, for the trial was by the court. If there was error in this finding, it must be because, as matter of law, in all cases where a father is indebted to his minor son, a lawsuit with the father is a necessary for the son. We are not prepared to establish such a rule. Prof. Parsons, in his work on Contracts, p. 246, enumerates in his list of articles not necessities for an infant: 'Horses, saddles, bridles, liquors, pistols, powder, whips, and fiddles, balls and serenades, counsel fees, and expenses of a lawsuit'—citing *Phelps v. Worcester*, 11 N. H. 51. But the circumstances of each case must govern. Thus, a horse might be necessary if the infant's health required him to ride. So a lawsuit might be necessary."

In *McIsaac v. Adams*, 190 Mass. 117, 76 N. E. 654, 112 Am. St. Rep. 321, 5 Ann. Cas. 729, it is said:

"In the aspect of the case most favorable to the plaintiff, he has no standing, unless the services were necessities. The plaintiff's testimony was the only evidence introduced at the trial; and we are of the opinion that there is nothing in it which warrants the finding in his favor. The services were rendered in connection with the settlement of an estate, in which the defendant's only interest was as legatee who would receive a not very large sum if the will should be allowed, or as a descendant of his

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grandfather, who would take as an heir at law if the will should be set aside. Protection of such an interest of a minor does not come within the term 'necessaries,' as used in reference to the liability of minors. Ordinary rights of property are to be protected by a guardian, and not left to the care of the minor himself, or to the irresponsible action of third persons. * * * When proceedings affecting the minor as a party are going on in a court, a guardian *ad litem* is appointed. * * * A judgment against a minor, without a probate guardian or a guardian *ad litem* to represent him, is voidable upon a writ of error. *Johnson v. Waterhouse*, 152 Mass. 585, 26 N. E. 234 [11 L. R. A. 440, 23 Am. St. Rep. 858]. We can conceive of conditions such that a minor may be bound to pay a reasonable compensation for the services of an attorney, on the ground that they were necessary; but ordinarily this liability is limited to cases where the services are rendered in connection with the minor's personal relief, protection, or liberty. The cases of *Crafts v. Carr*, 24 R. I. 397, 53 Atl. 275 [60 L. R. A. 129, 96 Am. St. Rep. 721], *Barker v. Hibbard*, 54 N. H. 539 [20 Am. Rep. 160], *Munson v. Washband*, 31 Conn. 303 [83 Am. Dec. 151], and *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101 [5 L. R. A. 176], are illustrations of the application of this rule. In the first, the services were rendered in an action, brought by the next friend of a female minor, to recover for an indecent assault upon her. In the second, the plaintiff had been employed to defend the defendant upon the charge of being the father of a bastard. In the third, the defendant had been seduced, and afterwards had been turned out of doors by her father, and the plaintiff had brought an action for the defendant against the seducer. In the fourth, the services were rendered in defending a minor upon an indictment for stealing. The cases recognize the general doctrine that legal services, rendered to a minor in regard to ordinary rights of property, are not necessities. See, also, as to this last proposition *Phelps v. Worcester*, 11 N. H. 51; *Thrall v. Wright*, 38 Vt. 494; *Conant v. Burnham*, 133 Mass. 503 [43 Am. Rep. 532]; *Tupper v. Cadwell*, 12 Metc. (Mass.) 559, 562 [46 Am. Dec. 704]. With the protection which the law gives minors in regard to their property, through its provisions for the appointment of guardians, it cannot be held that services of an attorney, without employment by a guardian, are necessary to a minor, in the settlement of the estate of a deceased person, in which he is interested."

There are other cases reported deciding that an infant is not liable in an action at law for legal services rendered relative to

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his estate or property. *Dillon v. Bowles*, 77 Mo. 603; *Englebert v. Troxell*, 40 Neb. 195, 58 N. W. 852, 26 L. R. A. 177, 42 Am. St. Rep. 665; *Cobbey v. Buchanan*, 48 Neb. 391, 67 N. W. 176; *Houck v. Bridwell*, 28 Mo. App. 644.

In *Hanlon et al. v. Wheeler* (Tex. Civ. App.) 45 S. W. 821, it was held:

“Under a law which authorizes a minor to contract for necessities, he may engage an attorney to prosecute an action for a personal injury.”

In Tennessee, in a damage suit for personal injuries, attorneys are entitled to a reasonable fee and to have a lien on judgment (*Smithson et al., Ex parte*, 108 Tenn. 442, 67 S. W. 864); but the amount was not entitled to be determined on *ex parte* hearing. A hearing at which the infant shall be represented by a guardian or guardian *ad litem* is essential.

In *People ex relatione Smith v. Mullin, Commissioner*, 25 Wend. (N. Y.) 698, the relator, imprisoned on execution for assault and battery, sought his discharge on compliance with the provisions of the statute relative to voluntary assignments by a debtor imprisoned in civil cases. It was held that he was entitled to a discharge, having complied with the provisions of said statute, and that such assignment was valid, notwithstanding his under age.

The undertaking of an infant, by bond or contract, to answer charge of bastardy, or to support his bastard child, may not be disaffirmed. *McCall v. Parker*, 13 Metc. (Mass.) 372, 46 Am. Dec. 735; *Stowers v. Hollis*, 83 Ky. 544; *People v. Moores*, 4 Denio (N. Y.) 518, 47 Am. Dec. 272; *Gavin v. Burton*, 8 Ind. 70; *Inhabitants of Township of Bordentown v. Wallace et al.*, 50 N. J. Law, 13, 11 Atl. 267. An infant having given security for the fine and costs to prevent being held in custody, and his surety having paid the same, on motion, judgment being rendered against the minor, it was held that the judgment, though arising out of a civil contract, was binding on the infant, and could not be disaffirmed. *Dial v. Wood*, 9 Baxt. (Tenn.) 296. An infant is bound on his recognizance or bail bond, not subject to be disaffirmed, for his personal appearance at court. *State v. Weather-*

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wax, 12 Kan. 463; *Commonwealth v. Semmes*, 38 Va. 665; *Attorney General v. Baker*, 9 Rich. Eq. (S. C.) 521; *Fagin v. Goggin*, 12 R. I. 398. A husband, though an infant, was held liable for the debts of his wife contracted before marriage. *Butler v. Breck*, 7 Metc. (Mass.) 164, 39 Am. Dec. 768; *Roach v. Quick et ux.*, 9 Wend. (N. Y.) 237. An infant widow was held to be liable on a contract by her for her deceased husband's funeral expenses. *Chappel v. Cooper*, 13 M. & W. 252, 13 L. Jour. 286.

In *Helps v. Clayton*, 112 Eng. Com. Law Rep. 553, (17 C. B. [N. S.] 553), it is said:

"The employment of the lady's solicitor to prepare the settlement is not a mere compliment or matter of patronage; it has also the substantial object of satisfying the lady's friends that all proper care has been exercised on her behalf by some person in whom they confide, and of giving a remedy for negligence by action against the solicitor. He does not the less act as the solicitor of the lady or her parent, because the intended husband is to be ultimately liable, in the event of the marriage taking place. The proper conclusion, therefore, is that the retainer is to be considered as that of the lady or her parent, as the case may be; but that usage makes the husband liable to indemnify whosoever, on the part of the wife, has properly incurred expense by retaining the solicitor to prepare a settlement in the propriety of which the latter has so large an interest. * * * Upon the remaining question—that of infancy—we have already stated our opinion. The principal contract of marriage was one which it was competent for an infant to enter upon. She had no property to settle, and would have had no certain provision without the settlement; and the preparation of the settlement was therefore beneficial, as securing to her, at her election, a proper division, which may justly be considered a necessity suitable to her estate and condition. It would be a perversion of the law, for the protection of infants, to hold that, under these circumstances, an infant could not contract for the preparation of such a settlement."

These cases are within the principle that, when a contract comes within the term "necessaries," or that which he is under a legal obligation to do, or is made pursuant to statutory authority, the minor is bound so that he may not disaffirm same. In the case of the infant female, the solicitor's bill for drawing a marriage settlement was reasonably incidental to her contracting marriage. An infant may contract marriage and do everything that

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is reasonably incidental and beneficial to her in carrying out or consummating the marriage contract.

In *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 435, the action of the chancery court in allowing, out of the ward's estate, counsel fees earned by the guardian for services for the ward in recovering property then being administered by the chancery court, such services being performed before his appointment as guardian, was under consideration. Under the Mississippi Code (Code 1871, sec. 976), which controlled that case, the chancery court had jurisdiction of the minor's business and all demands against his estate. This case is in harmony with the principle announced by this court in *Muskogee Development Co. v. Green et al.*, 22 Okla. 237, 97 Pac. 619, wherein it is held that an allotment of an infant without a legal guardian, living with his father, who is his natural guardian, having been leased by said natural guardian at the rate of 25 cents per acre per year for a period of five years, and for certain improvements to be made thereon, to consist of breaking land and building fences and houses, which benefited such estate, said contract having been entered into in good faith by all parties thereto (it being a fair contract), and believing it to be authorized under the law, said father afterwards having been appointed as legal guardian, repudiating said contract, the value of such improvements were allowed out of the rents in an accounting in equity; such improvements adding a value to the land in excess of their cost. This holding was in line with *MacGreal v. Taylor*, 167 U. S. 688, 17 Sup. Ct. 961, 42 L. Ed. 326.

In *Senseney, Trustee, v. Repp et al.*, 94 Md. 77, 50 Atl. 416, a bill in equity for partition was filed by the next friend of several infants. The solicitor who filed the bill and prosecuted the partition proceedings to final decree was allowed a fee out of the proceeds of the sale. In the opinion it is said:

"* * * He is seeking remuneration out of a fund which his services have produced, and produced for the benefit of the persons whose interests he in reality represented. His services were rendered for the benefit of the infants. Being infants, they were unable to contract with him. But the fund which those services realized was in court, and, after the debts due by the de-

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cedent had been paid, belonged to the widow and infants. It was entirely proper that out of what belonged to them the fee should be paid. * * *

In *Colgate v. Colgate*, 23 N. J. Eq. 372, it was announced that a court of equity may direct the guardian *ad litem* to employ counsel, approved by the court, to represent the infant, and that compensation may be fixed by the chancery court and ordered paid out of the infant's estate.

In *Connor v. Ashley*, 57 S. C. 305, 35 S. E. 546, it was held that a solicitor for a minor, in a bill in equity, was entitled to a fee of compensation for his services, to be allowed under fees brought into court by proper decree, under the power of equity in its control of minors' estates.

In *Owens et al. v. Gunther*, 75 Ark. 37, 86 S. W. 851, 5 Ann. Cas. 130, it was held that where, in a suit in chancery involving the real property of infants, the chancellor, on account of the fact that the statutory guardian of the infants claims an adverse interest in the property, refuses to allow him to defend for the infants and appoints a guardian *ad litem* for that purpose, who employs attorneys to represent him, and the latter conduct the litigation for the infants to a successful conclusion, the infants are liable for reasonable attorney's fees; but the amount cannot be made a lien on their property. See, also, *Petrie v. Williams et al.*, 68 Hun, 589, 23 N. Y. Supp. 237.

In the following cases, at actions in law, a recovery was sustained against the infant for legal services rendered in his behalf in relation to his property: *Searcy v. Hunter*, 81 Tex. 644, 17 S. W. 372, 26 Am. St. Rep. 837; *Sutton v. Henzle et al.*, 84 Kan. 756, 115 Pac. 560, 34 L. R. A. (N. S.) 238; *Nagel v. Chrilling*, 14 Mo. App. 576. But these cases hold that the contract is binding only to the extent of a reasonable compensation.

In *Searcy v. Hunter*, *supra*, it is said:

"Looking to the condition of affairs in our own state, it seems to us that to refuse to allow an attorney who, at the instance of a next friend, has instituted a suit in behalf of a minor and recovered for him money or property, to claim from the infant a reasonable compensation for his services would be to establish a rule which would operate to the prejudice of the class it is designed

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to protect. In such case, where the services have been beneficial to the infant, we are of the opinion that reasonable compensation should be allowed."

The disaffirmance of a contract made by an infant nullifies it and renders it void *ab initio*; and the parties are returned to the same condition as if the contract had never been made. After the infant has disaffirmed the contract, any one may take advantage of such disaffirmance. Where an infant avoids his contract, it cannot thereafter be resuscitated or ratified. 22 Cyc. 616; *Peck et al. v. Cain et al.*, 27 Tex. Civ. App. 38, 63 S. W. 177, and authorities therein cited.

An infant may avoid his contract by different means, according to the nature of the act and the circumstances of the case; but it may be that any act showing unequivocally a renunciation of, or a disposition not to abide by, the contract made during minority is sufficient to avoid it. 22 Cyc. 612. "Looking to the condition of affairs in our state," a different conclusion to that attained in the Texas case should be reached by us.

We believe that the rule in New Hampshire, followed in Massachusetts and other states, should prevail here. That is, where the services pertain to the defense of the liberty or person of the minor, or the prosecution of action for an injury thereto, that the same should be classed as a "necessary," and an action lie against the minor for a reasonable recovery for attorney's fees; but where the legal services are rendered in behalf of the minor in relation to his property, without the intervention of a legal guardian, no recovery for such services should be had in an action at law. As to whether a court of equity or probate court may allow for legal services at the instance of the minor in the administration of the estate or fund or property in such chancery or probate court, without the party having first obtained the approval of the court to render such service, that question is not involved in this case.

It is a well-known fact that in the Five Civilized Tribes, Osage Nation, Quapah country, and other Indian reservations in this state, minors are possessed of valuable landed estates, and are continually coming into such inheritances. The estates of

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these Indians, though wards of the federal government, are administered by the probate courts of this state; it being done by the surrender of that jurisdiction to the state tribunals by the federal authority. The federal legislation, heretofore referred to, shows a policy on the part of the federal government of precaution to carefully guard the interests of these Indian minors. The best interests of this state demand the speediest settlement of all Indian estates to the end that as much Indian land as is reasonably possible may become developed and help bear the burdens of the state, county, township, and school district governments. This can be brought about in a most salutary way by the local courts. When it comes to a question as to which line of authorities we will follow, that which permits the next friend, who is often an irresponsible person, to engage counsel for a minor to prosecute a suit at law in his behalf relative to his land, often occasioning an action at law against such minor, thereby affecting his estate, or that which requires first the approval of the probate court, we feel that we should incline to the old rule, as announced by the Supreme Court of New Hampshire, when it was composed of Chief Justice Parker and Justices Upham, Wilcox, Gilchrist, and Woods, and afterwards reaffirmed by the same court, when Chief Justice Sargent and Justice Doe were members of it.

Judgment was rendered by default against the defendants. The objection that the petition does not state a cause of action may be raised on review for the first time in this court. *Leforce et al. v. Haymes*, 25 Okla. 190, 105 Pac. 644; *International Harvester Co. v. Cameron*, 25 Okla. 256, 105 Pac. 189; *Lewis et al. v. Clements*, 21 Okla. 167, 95 Pac. 769; *Guthrie v. Nix, etc., Co.*, 3 Okla. 136, 41 Pac. 343; *Farris v. Henderson*, 1 Okla. 384, 33 Pac. 380.

The judgment of the lower court is reversed, and the cause remanded, with instructions to grant a new trial and proceed in accordance with this opinion.

All the Justices concur.

Couch v. Addy et al.

COUCH v. ADDY *et al.*

No. 3748. Opinion Filed December 3, 1912.

Rehearing Denied January 28, 1913.

(129 Pac. 709.)

1. **DEEDS—Definition.** A deed is defined to be a written instrument containing a contract or agreement, which has been delivered by the party to be bound, and accepted by the obligee or covenantee.
2. **SAME—Validity—Delivery—Acceptance.** To constitute a valid deed, not only must there have been an intention on the part of the grantors to deliver, but the grantee must accept the same in person, or by some one whom he has authorized to accept for him, or whose conduct he subsequently ratifies.
3. **HOMESTEAD—Deed—Delivery Without Consent of Wife—Effect.** Where husband and wife sign a deed to the homestead of the family under an agreement that the same shall not be delivered to the grantee named therein, and the husband, without the consent of the wife, delivers the deed to the grantee, who has notice of the agreement, the deed may be avoided by the wife after the death of her husband.

(Syllabus by the Court.)

*Error from District Court, Woods County;**R. H. Loofbourrow, Judge.*

Action by Fannie F. Addy and Charles M. Delzell, administrators of the estate of Wm. Addy, deceased, against Larkin S. Couch. Judgment for plaintiffs, and defendant brings error. Affirmed.

T. J. Womack, for plaintiff in error.

Rush & Smith and *Chase & Stevens*, for defendants in error.

KANE, J. This was an action, commenced by Fannie F. Addy, wife of Wm. R. Addy, to avoid an instrument in writing involving title to the homestead of the family, and to clear the title to the same. Upon trial to the court there was a decree in favor of the plaintiff, granting the relief prayed for, to reverse which action this proceeding in error was commenced.

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The land in controversy was proved up by William R. Addy, under the homestead laws of the United States; and the court, properly we think, held that at the times hereinafter mentioned it retained its homestead character.

It seems that William R. Addy was addicted to the excessive use of alcoholic liquors, and at times there were periods covering months in which he was incapable of transacting any business. That for two months immediately prior to the date of the contract hereinafter set out he had been on one of those periodic sprees, during which time he had squandered a great deal of money. That on the 15th day of June, 1903, the day the instruments were signed, his wife found him at Cleo, a town in Woods county, where, after some conversation between husband and wife concerning their homestead, they entered into the following agreement:

"This article of agreement entered into this 15th day of June, 1903, between W. R. Addy, party of the first part, and Fannie F. Addy, party of the second part, witnesseth: The said party of the first part by and with the consent of the party of the second part hereby agrees to execute a warranty deed to the west half of the southwest quarter of section eighteen (18), in township twenty-four (24) north of range nine (9) west to Thomas E. Addy of New York City, and also to execute a warranty deed to the east half of the southwest quarter of section eighteen (18), township twenty-four (24) north of range nine (9) west to Elida Buck of Wichita, Kansas, said deeds to be held in escrow by said grantees and placed with this article of agreement in the custody of the cashier of the Farmers' State Bank of Cleo, Oklahoma, to be held by him until such time when the above-described tracts of land shall be sold, or to be surrendered up to said parties to this agreement upon their joint demand, and that at the instance and request of the parties, or either of the said parties, to this contract said deeds or either of them, or this said article of agreement, shall be sent to the register of deeds of Woods county, Oklahoma, and there placed on record.

"Parties to this article of agreement further agree that when the said lands above described shall be sold that they will share equally in a division of the proceeds with the exception that party of the first part is to pay one hundred dollars (\$100.00) in cash to party of the second part over and above her half of the proceeds. It is further agreed by the parties to this article of agree-

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ment that both of the above tracts must be sold at the same time and not separately.

"Party of the first part hereby agrees with party of the second part that after the sale of the above-described tracts that if either party shall buy property with the proceeds of the sale of said land the other party shall have a joint interest in said property so bought by paying his or her half of the purchase price of said property. This article of agreement to remain in full force and effect for a period of one year from date thereof, unless rescinded by mutual consent of both parties to said article of agreement.

"Witness our hands this 15th day of June, 1903.

"WILLIAM R. ADDY.

"FANNIE F. ADDY.

"Witnessed by: PETER T. KOOP.

"D. BROWN."

It appears that neither the Thomas E. Addy nor the Elida Buck mentioned in the agreement knew anything about the execution thereof or the deeds therein mentioned, and that they had no knowledge that they had been designated as grantees therein. Two or three months after the deeds and agreement were placed in the hands of the cashier of the Farmers' State Bank of Cleo, as provided therein, William R. Addy withdrew the deed to Thomas E. Addy and had the same recorded. Thereafter William R. Addy died; whereupon Charles M. Delzell was appointed administrator of his estate. On the 14th day of September, 1904, Thomas E. Addy and Bertha Addy, his wife, executed and delivered a deed of conveyance to Larkin S. Couch. During all this time Mrs. Fannie F. Addy had remained in possession of the premises, and the court below found, upon sufficient evidence, that all of the defendants Thomas E. Addy, Bertha Addy, his wife, Larkin S. Couch, and Elida Buck, had notice of all of the facts upon which the plaintiff based her right of recovery. By way of answer Elida Buck filed a disclaimer, Thomas E. Addy set up the deed heretofore mentioned, and Larkin S. Couch set up the deed to him from Thomas E. Addy and Bertha Addy.

Plaintiff in error presents his grounds for reversal as follows:

"(1) No contention being made that there was any fraud practiced in the execution of the deed and contract, or by either

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of the grantees named in the deeds, the deed having been delivered in accordance with the terms of the contract, the transfer became absolute. (2) There is no evidence which in any manner contradicts the delivery of the deed. Being in the hands of the grantee after being recorded, being accepted by him, there must be positive evidence to show that it was not the intention to deliver the deed. There is no such evidence in the record. (3) That this deed was actually delivered was the finding of the court; the court having held that it transferred the absolute title to the plaintiff in error, except in so far as they conflict with the homestead interest of the plaintiffs therein. The deed delivered for one purpose must be delivered for all purposes. This is a pure mistake of law upon the part of the court."

At the outset, we think the court below and counsel were in error in giving to the instruments executed by Wm. R. Addy and his wife to Thomas E. Addy and Elida Buck the status of deeds. A deed is defined to be a written instrument containing a contract or agreement, which has been delivered by the party to be bound, and accepted by the obligee or covenantee. *People v. Watkins*, 106 Mich. 437, 64 N. W. 324; *McMurtry v. Brown*, 6 Neb. 368. At least two of the essential elements of a deed are lacking in the present transaction: (1) It is apparent on the face of the agreement between Wm. R. Addy and his wife that at the time of the execution of the deeds neither of them intended to sell the land to the grantees mentioned therein; and (2) neither of the grantees had any knowledge that the deeds were executed, and there is no evidence that either of them ever accepted the transfer to them within the life of the contract between Wm. R. Addy and his wife. It is true that by the terms of the contract they "agreed to execute warranty deeds" to the parties therein named; but that they did not intend the transaction to constitute a sale, or that the deeds should convey title or be delivered to the grantees therein named, is apparent from the subsequent language of the agreement, to the effect that the deeds and agreement should be placed in the hands of the cashier of the Farmers' State Bank of Cleo, "to be held by him until such time when the above-described tracts of land shall be sold, or to be surrendered up to said parties to the agreement upon their joint demand, and that at the instance and request of the parties * * * to said

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agreement said deeds or either of them, or this * * * agreement, shall be sent to the register of deeds of Woods county, Oklahoma, and there placed on record." In construing this contract it must not be forgotten that the parties to it were Wm. R. Addy and his wife, and that the grantees named therein had no knowledge of it, its execution, or its contents. Further, the parties agreed that when the above land was sold they would share equally in a division of the proceeds, with the exception that the wife was to receive \$100 over and above her half of the proceeds, and that both of the above tracts must be sold at the same time and not separately; and, further, it was agreed what should be done after the sale, in case either party should buy property with the proceeds of the sale. And, finally, they agreed that the contract should remain in force and effect for a period of one year, unless rescinded by mutual consent. The foregoing provisions of the contract are absolutely irreconcilable with an intention to sell the land to Thomas E. Addy and Elida Buck. It is too clear for controversy that the purpose of Wm. R. Addy and his wife, in so far as it is disclosed by their contract, was to sell the land to some one other than the grantees named in the deeds, if it could be done within the life of the contract, and divide the proceeds between themselves in conformity with its provisions. Moreover, the abstract of the evidence contained in the briefs of counsel for the respective parties does not disclose when the deed delivered to Thomas E. Addy was delivered, or when he accepted it, if at all, or whether delivery and acceptance, if such there were, occurred during the life of the agreement. It is well settled that to constitute a valid deed not only must there have been an intention on the part of the grantors to deliver, but the grantee must accept the same in person, or by some one whom he has authorized to accept for him, or whose conduct he subsequently ratifies. *Powell v. Banks*, 146 Mo. 620, 48 S. W. 664; *Meigs v. Dexter*, 172 Mass. 217, 52 N. E. 75.

Section 880, Wilson's Rev. & Ann. St. 1903, provides that no deed or mortgage or other contract relating to the homestead, other than a lease not exceeding one year, shall be valid, unless in writing and signed by the husband and wife, where they are

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living and not divorced, except to the extent hereinafter provided. And section 883 provides that if the husband shall make any deed, mortgage, or contract relating to the homestead without being joined in by the wife he shall be concluded thereby, and it shall only be avoided by the wife. If, after the agreement entered into by Wm. R. Addy and his wife, the husband delivered the joint deed to a part of the homestead, contrary to the terms of the agreement, his action cannot bind his wife, who did not agree to the delivery, whatever effect it may have had in concluding the husband. Under the last section of the statute above cited, the wife, after the death of the husband, was at liberty to avoid the deeds in a proper action, and this she has attempted to do.

As we find no reversible error in the proceedings had in the court below, the judgment must be affirmed.

All the Justices concur.

FISHER v. LOCKRIDGE, *County Judge*.

No. 4224. Opinion Filed January 28, 1913.

(130 Pac. 136.)

APPEAL AND ERROR—Review—Abstract Propositions. Abstract or hypothetical questions disconnected from the granting of actual relief, or from the determination of which no practical relief can follow, except the awarding of the costs, will not be determined on appeal, but the cause will be dismissed.

(Syllabus by the Court.)

Action by Alex Fisher for writ of mandamus against Ross F. Lockridge, county judge for Pottawatomie County. Writ quashed and petition dismissed.

Burwell, Crockett & Johnson and *B. F. Williams*, for plaintiff.

Shartel, Keaton & Wells and *F. H. Riley*, for respondent.

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WILLIAMS, J. On July 27, 1912, the plaintiff commenced an action in this court for the issuance of a writ of mandamus to require the respondent to certify to his disqualification in a certain cause pending in the county court of Pottawatomie county, specifically alleging certain grounds as to his disqualification.

On July 31, 1912, an alternative writ of mandamus was issued returnable on September 3, 1912. Respondent having made return to said writ, and the plaintiff having filed reply thereto on September 3, 1912, by agreement of all parties J. H. Everest, Esq., of Oklahoma City, Okla., was appointed referee to take evidence and report same together with his findings of fact and conclusions of law. The referee having made a report to this court, said cause was set for hearing on December 3, 1912, upon the exceptions of the respondent to the referee's report, at which time, after hearing, the same was submitted for determination. The term of office of the respondent expired on the first Monday of January, 1913, at which time his successor qualified, without this court having reached a determination in said cause. Abstract or hypothetical questions disconnected from the granting of actual relief, or from the determination of which no practical relief can follow, except the awarding of the costs, will not be determined on appeal, but the cause will be dismissed. Gray's Okla. Dig., and authorities cited in section 6, at page 31.

The plaintiff's alternative writ will be quashed, and the plaintiff's petition dismissed at his cost.

All the Justices concur.

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PERRY *et al.* v. HOBLIT.

No. 4509. Opinion Filed December 3, 1912.

Rehearing Denied January 28, 1913.

(129 Pac. 693.)

1. **APPEAL AND ERROR—Case-Made—Extension of Time.** Neither the court nor the judge thereof in vacation, after the time prescribed by the statute or granted by the court within which to prepare and serve a case-made has expired, has power to extend the time fixed by statute or previously granted by the court in which to make and serve a case-made.
2. **SAME.** A judge of the district court has no power to extend the time to make a case-made when he is out of the state, and an order so made is absolutely void.

(Syllabus by the Court.)

Error from District Court, Grady County;
Frank M. Bailey, Judge.

Action by Oscar Perry and others against D. L. Hoblit. From the judgment, Perry and others bring error. Dismissed.

Bond & Melton and F. E. Riddle, for plaintiffs in error.

R. E. Davenport, Simpson & Holding, and J. W. Bartholomew, for defendant in error.

HAYES, J. This proceeding in error is prosecuted upon petition in error and case-made. A motion to dismiss same has been filed by defendant in error, urging a dismissal thereof upon the ground that the case-made is void for two reasons. On the 12th day of June, A. D. 1912, the trial court made an order extending the time within which plaintiffs in error could serve their case-made for a period of 60 days from that date. This period of time expired on the 11th day of August. The case-made was not served during said period of time, and no further extension of time was made within that period. On the 12th day of August a second order of extension was made, and subsequently the case-made was served within the time attempted by this second order

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to be granted; but the second order of extension was void, for the reason that it was not made within the statutory three days' time for serving the case-made, nor within any time extended during such period. *Soliss v. Davis*, 28 Okla. 496, 114 Pac. 609.

A further reason why the second order made on August 12th is void is that at the time of making same the trial judge was without the state, being at that time in the state of Arkansas. *Blanchard v. U. S.*, 6 Okla. 587, 52 Pac. 736.

The motion to dismiss should be, and is, sustained.

TURNER, C. J., and WILLIAMS and DUNN, JJ., concur;
KANE, J., not participating.

JONES *et al.* v. BOSTICK.

No. 1923. Opinion Filed October 8, 1912.

Rehearing Denied February 4, 1913.

(129 Pac. 718.)

CHATTEL MORTGAGES—Replevin—Evidence—Defense. In a replevin action for the recovery of possession of certain chattels by virtue of a mortgage, the answer not disclosing a complete defense to the mortgage debt but only a partial failure of consideration, judgment was properly entered in favor of the plaintiff against the defendant.

(Syllabus by the Court.)

Error from Jackson County Court;
W. T. McConnell, Judge.

Action by J. R. Bostick against M. T. Jones and others. Judgment for plaintiff, and defendants bring error. Affirmed.

J. W. Bartholomew, for plaintiffs in error.

W. C. Austin, for defendant in error.

WILLIAMS, J. The defendant in error, as plaintiff, sued the plaintiffs in error, M. T. Jones and S. A. Hall, as defendants, in replevin for the recovery of certain chattels by virtue of a mortgage executed by said defendants to secure certain notes. The

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notes were given as consideration for the purchase of a certain acreage of cotton, corn, and millet. The defendants answered, admitting the execution of the mortgage and notes, but alleged certain fraudulent representations on the part of the plaintiff, in that they represented said acreage to be in excess of what it actually was, and also as to what such acreage produced the preceding year. There is neither any offer to nor tender back by the defendants in their answer of the cotton, corn and millet for which the notes and mortgage were executed, but a specific allegation of partial failure of consideration is made. Section 1137, Comp. Laws 1909; section 894, St. Okla. 1890; *Luger Furniture Co. v. Street*, 6 Okla. 312, 50 Pac. 125.

The question for determination under the issues is as to whether the plaintiff was entitled to possession of said property under said mortgage. If anything was due on said notes, the plaintiff was entitled to recover said possession. The notes were due at the time the action was brought, and default had been made under the terms of said mortgage. No contention is made as to a preliminary demand. No prejudicial error was committed in rendering judgment in favor of the plaintiff for the possession of the property for which the plaintiff sued. *Broyles et ux. v. McInteer*, 29 Okla. 767, 120 Pac. 283.

All the Justices concur.

MURPHY v. FITCH.

No. 2395. Opinion Filed January 28, 1913.

(130 Pac. 298.)

1. **INJUNCTION—Abolition of Writ—Effect of Statehood.** That part of section 5755, Comp. Laws 1909 abolishing the writ of injunction was not continued in force by section 2 of the Schedule of the Constitution at the erection of the state.
2. **SAME—Authorization of Writ.** The writ of injunction was made available at the erection of the state by sections 2 and 10, art. 7, of the Constitution.
 - (a) The writ of injunction is not an exclusive remedy in this state.

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(b) The statutory provisions as contained in sections 5755, 5756, and 5757, Comp. Laws 1909, except that part of section 5755 which abolishes the writ of injunction, were continued in force after the erection of the state by section 2 of the Schedule of the Constitution, and are cumulative remedies.

3. **SAME—When Granted.** Where certain lots were in possession of F., claiming title thereto, and the same are sought to be taken forcible possession of by M., who claimed an adverse title, F.'s possession may be preserved until the final determination as to the title by means of injunction.
4. **APPEAL AND ERROR—Objections Not Made Below.** It is too late to make objection, for the first time, in the Supreme Court that a waiver of a trial by jury had not been made, or did not appear of record in the trial court.

(Syllabus by the Court.)

Error from District Court, Comanche County;
J. T. Johnson, Judge.

Action between Uriah Murphy and G. F. Fitch. From the judgment, Uriah Murphy brings error. Affirmed.

R. W. Skipper, Stevens & Meyers, and T. B. Orr, for plaintiff in error.

Hudson & Whalin, for defendant in error.

WILLIAMS, J. Plaintiff, in his petition, alleged as follows:

"That he is now and was at all times hereinafter set out and ever since * * * the owner in fee simple and in the lawful possession of lots 7 and 8, in block 46, in the town of Temple, Comanche county, state of Oklahoma, together with the appurtenances thereunto belonging, and the defendant herein, on the 14th day of January, 1911, unlawfully entered upon said premises of this said plaintiff and with gun in hand then and there threatened and attempted to shoot and kill said plaintiff, and then and there threatened to take possession of said lots and the buildings and improvements thereon from this plaintiff; that said defendant still continues to threaten to hurt said plaintiff, and to take from said plaintiff said premises, and to possess himself therewith, and to take the household effects therein belonging to this plaintiff and hold them and said house and said lots against the interests and to the great and irreparable injury and loss to this plaintiff.

"Plaintiff further says that, unless said defendant is restrained and enjoined from molesting said plaintiff in his posses-

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sion of said premises, he will carry his said threats into execution, and will harm and injure said plaintiff in his person and in his effects, and especially will he do irreparable injury to the said premises; that said premises consist of two lots, a thirteen-room house, a cistern and out-house, a storm cave, and other improvements, and that said house is partially furnished with beds and other furnishings and fixtures, all the property of this plaintiff, and all of which is liable to be and will be injured by said defendant, unless he is restrained and enjoined, as aforesaid; that said defendant has threatened to scare and drive this plaintiff away from said premises, and has threatened to shoot and kill this plaintiff if he did not quit and leave said premises, and deliver the same up to said defendant, and plaintiff verily believes he will do harm to the person of said plaintiff and great and irreparable injury to the property of said plaintiff if he is not restrained from so doing; that said defendant is insolvent, and this plaintiff has no adequate remedy at law."

Then follows a prayer that all parties interested "with him [defendant] in any manner in the disturbance of the peaceful possession of this plaintiff, including any one acting with him as agent, employee, or otherwise, be perpetually enjoined and restrained from entering upon plaintiff's said premises, and from in any manner interfering with said plaintiff in his possession of said premises, or in any manner attempting to interfere with the household effects of said plaintiff, and for all other and further relief and for costs."

On January 17, 1911, a temporary injunction was granted as prayed for. On January 18, 1911, defendant filed a motion asking that said injunction be dissolved, said motion being supported by affidavits; but said motion and affidavits are sought to be brought before this court as a part of the transcript, which is not permissible, and therefore cannot be considered here on review for any purpose. *Richardson et vir v. Beidleman et al.*, 33 Okla. 463, 126 Pac. 816, and authorities therein cited.

The record discloses that by a court order the motion of the defendant to dissolve the injunction granted on January 17, 1911, was overruled on February 4, 1911, and the injunction theretofore granted on January 17, 1911, was in all matters and things sustained. The journal entry further states:

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"It is further ordered and adjudged by the court that the defendant, Uriah Murphy, do quit, vacate, and surrender up the premises hereinafter described to the plaintiff, G. F. Fitch, within ten days from this date, and upon his failure to do so the sheriff of Comanche county is hereby directed to move the said Uriah Murphy, and any household effects and properties that he may have placed on said premises, off of said premises and put the said Fitch in full possession of said premises; the said premises being lots seven (7) and eight (8), in block forty-six (46), and the improvements thereon, in the town of Temple, Comanche county, state of Oklahoma."

The defendant challenged the sufficiency of plaintiff's petition by general demurrer. It appears from the record that evidence was heard by the court before said order was entered.

Did the petition state (1) a cause of action, and was the order (2) entered in excess of the power of the court?

The statutes in this state relative to injunctions and the granting of the same are as follows:

"The injunction provided by this Code is a command to refrain from a particular act. It may be the final judgment in an action, or may be allowed as a provisional remedy, and, when so allowed, it shall be by order. The writ of injunction is abolished." (Section 5755, Comp. Laws 1909.)

"When it appears, by the petition, that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or when, during the litigation, it appears that the defendant is doing, or threatens, or is about to do or is procuring or suffering to be done, some act in violation of the plaintiff's right respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. And when, during the pendency of an action, it shall appear, by affidavit, that the defendant threatens or is about to remove or dispose of his property with intent to defraud his creditors, or to render the judgment ineffectual, a temporary injunction may be granted to restrain such removal or disposition. It may, also, be granted in any case where it is specially authorized by statute." (Section 5756, Comp. Laws 1909.)

"The injunction may be granted at the time of commencing the action, or any time afterwards, before judgment by the district court, or the judge thereof, or, in his absence from the coun-

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ty, by the county judge, upon its appearing satisfactorily to the court or judge, by the affidavit of the plaintiff or his agent, that the plaintiff is entitled thereto." (Section 5757, Comp. Laws 1909.)

The writ of injunction was abolished by said section 5755, but the same seems to have been revived by sections 2 and 10 (sections 187 and 195, Williams' Ann. Const. Okla.), art. 7, of the Constitution of this state. *Baker v. Newton et al.*, 22 Okla. 658, 98 Pac. 931; *Newhouse v. Alexander*, 27 Okla. 46, 110 Pac. 1121, 30 L. R. A. (N. S.) 602, Ann. Cas. 1912B, 674.

However, the writ of injunction is not an exclusive remedy in this state. The statutory provisions as contained in sections 5755, 5756, and 5757, except that part of section 5755 which attempts to abolish the writ of injunction, appear to have been brought over by section 2 of the Schedule (section 364, Williams' Ann. Const. Okla.), and to be cumulative. *Newhouse v. Alexander*, *supra*; *State ex rel. Huston*, 27 Okla. 606, 113 Pac. 190, 34 L. R. A. (N. S.) 380.

The petition stated a cause of action. *Glasco v. School District*, 24 Okla. 236, 103 Pac. 687, and authorities therein cited; *Black v. Jackson*, 177 U. S. 349, 20 Sup. Ct. 648, 44 L. Ed. 801.

It is too late to make objection, for the first time, in this court that waiver of a trial by jury had not been made, or did not appear of record in the trial court. *Farmers' Nat. Bank v. McCall*, 25 Okla. 600, 106 Pac. 866, 26 L. R. A. (N. S.) 217; *Johnston et ux. v. Haynes*, 68 N. C. 509.

So, too, the question as to the parties hereto being entitled to a right of trial by jury on the issue as to the ownership of the title to said premises is not involved in this review. The parties to said action being entitled to a jury trial, unless the same was waived as to such issues, a verdict of a jury should have been had and judgment rendered thereon, and then, as an incident thereto, the mandatory relief could have been properly awarded.

On the matters as disclosed by the transcript, no error is apparent. *Pomeroy*, Eq. Jur. (Student's Ed.) sec. 1359; *Smith v. Speed*, 11 Okla. 95, 66 Pac. 511, 55 L. R. A. 402; *Long v. Kasebeer*, 28 Kan. 226; *Webster v. Cooke*, 23 Kan. 640;

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Whitcar v. Michenor, 37 N. J. Eq. 6; *Broome v. Telephone Co.*, 42 N. J. Eq. 141, 7 Atl. 851; *Hodge v. Giesc*, 43 N. J. Eq. 342, 11 Atl. 484; *Wheelock v. Noonan*, 108 N. Y. 179, 15 N. E. 67, 2 Am. St. Rep. 405; *Corning v. Troy Iron & Nail Factory*, 40 N. Y. 191; *Church v. Gristgau*, 34 Wis. 328; *Big Six Development Co. v. Mitchell*, 138 Fed. 283, 70 C. C. A. 569, 1 L. R. A. (N. S.) 332; *Sugar-Pine Lbr. Co. v. Lbr. & Imp. Co.* (C. C.) 86 Fed. 528; *United States v. Brighton* (C. C.) 26 Fed. 218; *In re Lennon*, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1113; *Garretson v. Cole*, 1 Har. & J. (Md.) 373; *Webb v. Portland Mfg. Co.*, 3 Summ. 189, Fed. Cas. No. 17,322; *Manchester v. Workop*, 23 Beav. 198; *Spencer v. London Ry. Co.*, 8 Sim. 193; *Harbison v. White*, 8 Rep. (N. S.) 586; *Goddson v. Richardson*, 9 Chan. Ap. 221; *Martyr v. Lawrence*, 2 De G., J. & S. 261; *Cole-Silver Mining Co. v. Virginia*, 1 Sawy. 685, Fed. Cas. No. 2,990.

We have treated the order appealed from as a final order or decree, as contended for by counsel for the plaintiff in error, and examined the record carefully and passed on the only questions that could properly be raised on a transcript.

The judgment of the lower court is affirmed.

All the Justices concur.

TATE v. STONE.

No. 2401. Opinion Filed January 28, 1913.

(130 Pac. 296.)

1. **APPEAL AND ERROR—Pleading—Verification—Effect—Admissions.** In all actions, allegations of the execution of written instruments and indorsements thereon, of the existence of a corporation or partnership, or of any appointment or authority, or the correctness of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true, unless the denial of the same be verified by the affidavit of the party, his agent or attorney.

(a) Where a petition alleges that H. was the legal guardian of N., and the answer is a general denial, being unverified, it is admitted that H. was the legal guardian of said N.

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(b) It being admitted under the pleadings that H. was the guardian of N., it was error without prejudice to admit parol evidence, without any predicate being laid for the introduction of such evidence, that H. was the legal guardian of N.

2. **INDIANS—Lease of Allotment—Validity.** No allottee of the Choctaw or Chickasaw Tribes of Indians was permitted to lease his allotment, or any portion thereof, for a longer period than five years.
3. **SAME.** Every such lease, which is not evidenced by writing, setting out specifically the terms thereof, or which is not recorded in the clerk's office of the United States court for the district in which the land is allotted, or proper register of deeds' office, within three months after its execution shall be void; and the purchaser or lessee shall acquire no rights whatever by an entry or holding thereunder. Act June 28, 1898, c. 517, 30 St. at L. 507.
4. **JUSTICES OF THE PEACE—Appeal—Instructions in County Court.** As to cases commenced in the justices of the peace courts after the erection of the state and appealed to the county court under section 12, art. 7 (section 197, Williams' Ann. Const. Okla.), of the Constitution of this state, the judge of said court, as a court of record, is authorized to instruct the jury as to the law applicable to the case; and said jury is bound by said instructions.
5. **APPEAL AND ERROR—Exclusion of Evidence—Harmless Error.** Error must affirmatively appear to have been committed in the exclusion of evidence in the trial court before a reversal on such ground may be had in this court.

(a) Evidence excluded will not operate as reversible error, unless it affirmatively appears to have been material under the issues framed.

(Syllabus by the Court.)

*Error from Grady County Court;
N. M. Williams, Judge.*

Action by L. D. Stone against A. P. Tate. Judgment for plaintiff, and defendant brings error. Affirmed.

F. E. Riddle, for plaintiff in error.

Bond & Melton, for defendant in error.

WILLIAMS, J. On March 23, 1909, the defendant in error, as plaintiff, commenced a forcible detainer action against the plaintiff in error, as defendant, in a justice of the peace court for the possession of a certain tract of land. On March 16, 1909, plaintiff served notice upon the defendant to quit.

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In his petition he declares that he was "entitled to immediate possession of said land * * * by virtue of a contract with Geo. A. Harrison, of Ada, Oklahoma, guardian of Chilly Nelson, a citizen of the Choctaw Nation, and the allottee of the land above described, which said contract has been duly approved by the court as in such cases made and provided." A copy of said contract, together with the order of the court approving the same, was attached as a part thereof and identified as an exhibit. It was further declared that the defendant "is now unlawfully detaining the possession of said lands from this plaintiff, after due and legal demand made therefor." The lease contract, attached to the petition, on said lands was in favor of the plaintiff for a term of five years, commencing with the date of the lease.

The defendant demurred to the petition, on the ground (1) it neither stated facts sufficient to constitute a cause of action, nor (2) to give the court jurisdiction. Said demurrer having been overruled, defendant answered by way (1) of general denial, and (2) "defendant denies that the plaintiff is entitled to the immediate possession of said land, or any part thereof; denies that he is now unlawfully detaining the possession of said land from said plaintiff, after due and legal demand, as alleged." Said answer was unverified.

Judgment having been rendered in the justice of the peace court in favor of plaintiff, an appeal was prosecuted to the county court, where, after a trial, judgment was again rendered in favor of the plaintiff.

Plaintiff in error raises the following questions: (1) The trial court erred in permitting the plaintiff to introduce in evidence the lease attached as exhibit to said petition, (2) in refusing to permit defendant to introduce in evidence a certain lease contract under which he claimed to be holding possession of said land, which was not recorded within three months after its execution, and (3) in directing a verdict in favor of plaintiff.

1. Section 5648, Comp. Laws 1909 (section 3986, St. Okla. 1893) provides:

"In all actions, allegations of the execution of written instruments and indorsements thereon, of the existence of a corporation or partnership, or of any appointment or authority, or the

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correctness of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney."

In *McCabe & Steen Const. Co. v. Wilson*, 17 Okla. 355, 87 Pac. 320, the petition of the plaintiff contained the allegation that J. Pratt was the general superintendent of the construction for defendant, and that one Fallahay was the foreman of the bridge gang for the defendant; and, further, it was alleged that the defendant was employed through Pratt, its general superintendent, etc. The answer, which was unverified, contained (1) a general denial, (2) allegation that the injury was caused by the act of the fellow servant, and (3) contributory negligence and assumption of risk. It was held that under the issues as framed the defendant was not entitled to prove that neither was Pratt its superintendent nor Fallahay its bridge foreman. See, also, *St. L. & S. F. R. Co. v. Cake*, 25 Okla. 227, 105 Pac. 322; *St. L. & S. F. R. Co. v. Phillips*, 17 Okla. 264, 87 Pac. 470; *United States v. Alexander et al.*, 2 Idaho (Hasb.) 386, 17 Pac. 746; *Griswold v. Trustees of Peoria University*, 26 Ill. 41, 79 Am. Dec. 361.

Under the pleadings it was admitted that George A. Harrison was the legal guardian of the allottee, Chilly Nelson; and therefore no prejudicial error was committed in permitting plaintiff to testify that said Harrison was her legal guardian. There being no controversy as to the execution of said lease, in view of the admission as to the guardianship, in any event the lease was admissible in evidence.

2. By the Atoka Agreement (Act June 28, 1898, c. 517, 30 St. at L. 495) it is provided that no allottee can lease his allotment, or any portion thereof, for a longer period than five years, and then without the privilege of renewal. The lease must be evidenced by writing, setting out specifically the terms, and recorded in the proper recorder's office of the district or county in which the land is located within three months after its execution; and any lease not meeting with such requirements is void, and the lessee acquires no right whatever to hold thereunder. See Bledsoe's Indian Land Laws, sec. 70, p. 101; 30 St. at L. 507. The lease which the defendant offered in evidence for the purpose of

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justifying his holding possession of said land was executed prior to the act of April 26, 1906, c. 1876, 34 St. at L. 137, and was not recorded, as required by the provisions of the Atoka Agreement (30 St. at L. 507).

3. Did the court err in directing a verdict in plaintiff's favor? This cause arose after the erection of the state, and having been appealed to the county court, which was a court of record, the judge of said court was authorized to instruct the jury as to the law applicable to the case; and the jury was bound by such instructions. *Baker v. Newton*, 27 Okla. 436, 112 Pac. 1034; *Crump et al. v. Pitchford*, 24 Okla. 808, 104 Pac. 911.

The defendant offered in evidence a certain lease contract from Chilly Nelson to Whiteman; but the record does not disclose when said contract was made, or whether it was acknowledged and recorded in due time. The plaintiff objected to its introduction on the following grounds: That it was not recorded within the time provided by law, and is therefore void, also that the lease has never been signed by Whiteman, and for the further reason that the lease has never been acknowledged by Whiteman, as provided by law, being for a period of more than one year. Unless the lease was acknowledged and recorded within the time prescribed by law, it was void. However, it might be admissible to show that the lessee went into possession under it. Though the lease was void, the obtaining possession might create a relation of tenancy at will. The record further states that the defendant offered in evidence a lease contract from Whiteman to Bassett, recorded at page 323 of volume 16 of the Register of Deeds, of Grady county, Okla., covering the lands in controversy. Plaintiff objected to the introduction of the same, for the reason that it had not been shown that Whiteman had any authority to make such lease, or that Whiteman had any interest in the lands in controversy. Nowhere are these leases set out in the record.

In *National Drill & Mfg. Co. v. Davis*, 29 Okla. 625, 120 Pac. 976, paragraph 2 of the syllabus is as follows:

"Error must affirmatively appear to have been committed in the exclusion of evidence in the trial court before a reversal on such ground may be had in this court. (a) Certified copies of the

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records of G. county, relating to the transaction on which the action was based, having been offered in evidence by the plaintiff in error, the defendant in error objected, on the ground that the same were not properly authenticated; but such alleged copies, including the authentication, are not made a part of the record before this court. *Held* that, in the absence of copies of such alleged certificate, this court cannot determine whether error was committed, and in that event no reversible ground is shown. (b) Evidence excluded will not operate as reversible error, unless it affirmatively appears to have been material under the issues framed."

See, also, *Herron v. M. Rumley Co.*, 29 Okla. 317, 116 Pac. 952.

If the defendant obtained a lease from the allottee, and on account of failure to comply with the requirements of the act of Congress, relative to acknowledgments and recording the same, it was void, yet, if he took possession under said void contract and held for a year, and then held from year to year, a tenancy at will might be established, and this void contract might be introduced, in order to show what notice was essential in order to terminate the tenancy. But the contract sought to be introduced in evidence in this case was from the allottee to one Whiteman, and then from Whiteman to the defendant. If the contract was void between the allottee and Whiteman, Whiteman would have no right to contract with the defendant as to the possession of said land.

The burden is upon the plaintiff in error to show error. Under the status of this record we are unable to tell whether any error was committed by the trial court. The presumption is in favor of the judgment of the lower court being free from error.

The judgment of the lower court is affirmed.

All the Justices concur.

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KNIGHT *et al.* v. STATE *ex rel.* HENRY, *County Atty.*

No. 2847. Opinion Filed January 28, 1913.

(130 Pac. 282.)

BAIL—Recognizances—Criminal Prosecution. A recognizance, conditioned that the party charged shall appear and answer to a certain charge that may be preferred against him at a named term of the court, and to do and receive what shall be enjoined by said court upon him, and not depart from the said court without leave, may be extended to any subsequent term of said court by a continuance of said cause to such term.

(a) The party charged failing to appear at such subsequent term, such recognizance may be duly forfeited and enforced against the sureties thereon.

(Syllabus by the Court.)

*Error from Greer County Court;
Jarret Todd, Judge.*

Action by the State, on the relation of H. D. Henry, county attorney, against T. H. Knight and others. Judgment for relator, and defendants bring error. Affirmed.

B. F. Van Dyke, for plaintiffs in error.

H. D. Henry, County, Atty., for defendant in error.

WILLIAMS, J. On September 6, 1910, the defendant in error sued the plaintiffs in error, T. H. Knight, T. W. Baker, and M. D. Suitor, on a certain bail recognizance in favor of the state of Oklahoma.

Section 7112, Comp. Laws 1909 (Section 5941, St. Okla. 1890), is as follows:

"If, without sufficient excuse, the defendant neglects to appear according to the terms or conditions of the recognizance, bond or undertaking, either for hearing, arraignment, trial or judgment, or upon any other occasion when his presence in court or before the magistrate may be lawfully required, or to surrender himself in execution of the judgment, the court must direct the fact to be entered upon its minutes, and the recognizance, bond or undertaking of bail, or the money deposited instead of

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bail, as the case may be, is and shall be thereupon declared forfeited. * * *

The language of the recognizance is that the principal "shall personally be and appear before the * * * county court * * * at the present term, held at Mangum, * * * to answer a charge of transporting intoxicating liquors * * * and to do and receive what shall be enjoined by said court upon him, and shall not depart the said court without leave." This recognizance, executed pursuant to said provision of the statute, was a "continuing bond."

In *Glasgow et al. v. State*, 41 Kan. 333, 21 Pac. 253, paragraph 2 of the syllabus is as follows:

"Section 53, c. 82, Comp. Laws 1885, authorizes an examining magistrate to require a defendant in a criminal action to enter into a recognizance for his appearance at the court where such defendant is to be tried; and, when the defendant gives one, conditioned to appear at such court to answer the charge against him, and not depart therefrom without leave, it is valid, and within the provisions of said section."

In the opinion it is said:

"The contention of the defendants is that the statute only authorizes the examining magistrate to take bail for the appearance of the defendant, and because the bond provides, not only for the appearance, but that he is to answer the charge made against him, and not to depart from the court without leave, it is more onerous than the provisions of the statute, and for that reason is a nullity, and cannot support the judgment based upon it. They also claim that the conditions of such a bond as would have been authorized by statute were fully complied with by the defendant McGuire; that he did appear at the term of the court, and therefore his sureties on the bond were released from all liability. We think when a party is required to appear at the district court, after a preliminary examination has been had or waived, that the use of the word 'appear' implies that he is to appear for the purposes of a trial of the charges made against him. * * *

See, also, *Shriver et al. v. State*, 32 Okla. 507, 122 Pac. 160.

In *Ellison v. State*, 8 Ala. 273, it is said:

"When the recognizance is inspected, we find that the recognizers bound themselves that David A. Armstrong should make his personal appearance at the fall term of the circuit court of

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Dallas, for the year 1843, to answer to a charge of the state, for an assault and battery, upon one David Armstrong, and, further, to do what should be required by that court. * * * At that term of the court, an indictment for that offense was returned by the grand jury, but no proceedings on the recognizance, or against the recognizers, was had until the spring term, 1844, when the principal being called and not appearing, a judgment *nisi* was rendered against each of the parties to the recognizance for the sum of \$500. It is now insisted that the recognizers, not having been called to produce their principal at the fall term, 1843, were virtually discharged from all liability to do so at a subsequent term. It is said by Hawkins that: 'If persons be bound by recognizance for the appearance of one in the King's Bench, on the first day of the term, and that he shall not depart till he shall be discharged by the court, and afterwards a *nolle prosequi*, as to the particular charge upon motion is entered, and another is exhibited on which the defendant is convicted and refuses to appear in court after personal notice, the recognizance is forfeited; for, being express that the party shall not depart till he be discharged by the court, it cannot be satisfied unless he is forthcoming and ready to answer to any other information exhibited, while he continues not discharged, as much so as to that which he was particularly bound to answer to.' 2 Hawk. 173. Our practice, in misdemeanor cases, is supposed to differ from that pursued in England, inasmuch as the trial is always had when the defendant is present, and he is considered in strict custody as soon as placed on trial; but, even with this difference in practice, the quotation from Hawkins is conclusive to show that the recognizers are bound to produce their principal to answer the charge, and that they are not released by the omission to call out the recognizance at the term at which the indictment is found. No injury can ever arise to the recognizers, as they are entitled at any time to surrender their principal in discharge of the recognizance. Clay's Dig. 450, par. 34. Whether the recognizance would continue in force, without some special order, when no indictment was returned at the proper term is a question not involved in this case. * * *

Our statute also provides that a party admitted to bail may be arrested by his bailors at any time before they are finally discharged, at any place within the state, or, by a written authority indorsed on a certified copy of the recognizance, bond, or undertaking, may empower any officer or person of suitable age and discretion to do so, and he may be surrendered and delivered

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to the proper sheriff or other officer, before any court, judge, or magistrate having the proper jurisdiction in the case, and at the request of such bail the court, judge, or magistrate shall recommit the party so arrested to the custody of the sheriff or other officer, and indorse on the recognizance, bond, or undertaking, or certified copy thereof, after notice to the district (county) attorney, and, if no cause to the contrary appear, the discharge and exoneration of such bail; and the party so committed shall therefrom be held in custody until discharged by due course of law. Section 7111, Comp. Laws 1909.

The following authorities support the rule announced in the Alabama case: *Gentry v. State*, 22 Ark. 544; *Moore v. State*, 28 Ark. 480; *Price et al. v. State*, 42 Ark. 178; *Hortsell v. State*, 45 Ark. 59; *Norfolk et al. v. People*, 43 Ill. 9; *Stokes et al. v. People*, 63 Ill. 489; *Gallagher et al. v. People*, 88 Ill. 335; *Rubush v. State*, 112 Ind. 107, 13 N. E. 877; *State v. Brown et al.*, 16 Iowa, 314; *State v. Ryan et al.*, 23 Iowa, 406; *Commonwealth v. Branch*, 64 Ky. (1 Bush) 59; *Ramey, etc., v. Commonwealth*, 83 Ky. 534; *Id.*, 7 Ky. Law Rep. 704; *State v. Plazencia*, 6 Rob. (La.) 417; *People v. Hanaw*, 106 Mich. 421, 64 N. W. 328.

The judgment of the lower court is affirmed.

All the Justices concur.

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No. 2867. Opinion Filed January 28, 1913.

(130 Pac. 525.)

1. **REMOVAL OF CAUSES—Increase or Ad Damnum.** Where plaintiff amends his petition, increasing the amount sued for so as to constitute a removable cause to the proper federal court, the right to remove is thereby given, and, if the defendant by proper application in due time avails itself of that right, it cannot be denied.

(a) Where the defendant, resident of another state, regularly and strictly in accordance with Act Cong. Sept. 24, 1789, c. 20, 1 St. at L. 73, known as the "Judiciary Act," as amended by Act March 3, 1887, c. 373, 24 St. at L. 552, and by Act Aug. 13, 1888, c. 866, 25 St. at L. 433 (U. S. Comp. St. 1901, p. 508), files his petition in the state court for the removal of the cause to

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the United States Circuit Court, and a sufficient bond, which is offered for the approval of the state court, the said court is *ipso facto* ousted of jurisdiction; and whether an order for removal is granted or denied by the state court, all further proceedings therein are *coram non iudice* and void.

2. **REMOVAL OF CAUSES—Actions Under Employer's Liability Act.** Act April 5, 1910, c. 143, 36 St. at L. 291 (U. S. Comp. St. Supp. 1911, p. 1324), amending section 6 of the Employer's Liability Act (Act April 22, 1908, c. 149, 35 St. at L. 66 [U. S. Comp. St. Supp. 1909, p. 1173]), so as to provide that the jurisdiction of the courts of the United States under said act shall be concurrent with that of the courts of the several states, and no case arising thereunder and brought in any state court of competent jurisdiction shall be removed to any court of the United States, has no application to actions brought prior to the amendment.

(Syllabus by the Court.)

*Error from District Court, Okfuskee County;
John Caruthers, Judge.*

Action by Robert L. Blevins against the Ft. Smith & Western Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

C. E. & H. P. Warner, for plaintiff in error.

Winston T. Banks, for defendant in error.

WILLIAMS, J. This proceeding in error seeks to review the judgment of the trial court wherein the defendant in error, as plaintiff, sued the plaintiff in error, as defendant, to recover for personal injuries. By petition filed January 19, 1909, plaintiff alleged injuries to have been sustained by him on May 21, 1909, as a result of the negligence of the defendant in the sum of \$1,999.90 whilst in the employ of the said defendant, on a work train, assisting in ditching the sides of its track and removing the dirt to fills, and doing such other things connected with the work as he was directed by the defendant's foreman in charge. At the first trial on May 10, 1910, a verdict was rendered for plaintiff in the sum of \$300. Plaintiff moved for a new trial. This motion being concurred in by the defendant the same was granted; the plaintiff being given twenty days to file an amended petition. On May 26, 1910, plaintiff filed such amended petition to recover in the sum of \$1,999.90. On February 15,

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1911, the case was called for trial, and plaintiff, upon application, was given leave to amend his petition by changing the general allegation to read that the plaintiff had been damaged in the sum of \$12,250 instead of \$1,999.90, and changed the prayer in said petition and asked for the recovery of \$12,000 damages and \$250 expenses and medical aid, making a total of \$12,250, instead of \$1,999.90, to which defendant excepted. Thereupon defendant was given until 1:30 p. m. o'clock to plead to the amended pleading. On the same day the defendant asked leave to file application to remove the cause to the federal court, and same was in due form with the required bond.

Where the plaintiff amends his petition increasing the amount or *ad damnum*, so as to constitute a removable cause, the right to remove is thereby given, and, if the defendant by proper application in due time avails itself of that right, it cannot be denied. *Huskins v. Cincinnati, N. O. & T. P. Ry. Co.*, 37 Fed. 504, 3 L. R. A. 545; *Cookerly v. Great Northern Ry. Co.* (C. C.) 70 Fed. 277; *Speckart v. German National Bank et al.* (C. C.) 85 Fed. 12; *Bailey v. Mosher et al.* (C. C.) 95 Fed. 223. In *Powers v. Chesapeake & Ohio Ry. Co.*, 169 U. S. 100, 18 Sup. Ct. 264, 42 L. Ed. 676, it was held that under Act Cong. March 3, 1887, c. 373, 24 St. at L. 552, amending Act Cong. 1789, c. 20, 1 St. at L. 73, known as the "Judiciary Act," as corrected by act Aug. 13, 1888, c. 866, 25 St. at L. 433 (U. S. Comp. St. 1901, p. 508), the right to remove could be exercised as soon as the pleadings on behalf of plaintiff were so amended as to show a removable cause, although as originally begun the action was not removable because the necessary diversity of citizenship or amount in controversy did not appear.

In *Stevens et al. v. Phoenix Ins. Co.*, 41 N. Y. 149, it is held:

"Where the defendant, citizen of another state, regularly, and strictly in accordance with act of Congress of 1789, known as the 'Judiciary Act,' files his petition in the state court for the removal of the cause to the United States Circuit Court, and a sufficient bond, which is offered for the approval of the state court, the state court is *ipso facto* ousted of jurisdiction; and, whether an order for removal is granted or denied by the state

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court, all further proceedings therein are *coram non judice* and void."

See, also, *C., R. I. & P. Ry. Co. v. Brazzell*, 33 Okla. 122, 124 Pac. 40; *Western Coal & Mining Co. et al. v. Osborne*, 30 Okla. 235, 119 Pac. 973; *Bolen-Darnell Coal Co. v. Kirk*, 25 Okla. 273, 106 Pac. 813, 26 L. R. A. (N. S.) 270; *Choctaw, O. & G. R. Co. v. Burgess*, 21 Okla. 110, 95 Pac. 606.

The foregoing proposition does not appear to be controverted by counsel on either side; both sides joining in stating that the trial court denied same on the theory that Act Cong. April 5, 1910, c. 143, 36 St. at L. 291 (U. S. Comp. St. Supp. 1911, p. 1324), passed to amend Employer's Liability Act April 22, 1908, c. 149, 35 St. at L. 65 (U. S. Comp. St. Supp. 1909, p. 1173; U. S. Comp. St. Supp. 1911, p. 1322), deprived defendant of such right of removal.

This identical question is passed on in *Newell v. Baltimore & O. R. Co.* (C. C.) 181 Fed. 698, wherein it is said:

"In addition, the amendment of 1910 does not confer jurisdiction upon pending suits. The use of the words, 'may be brought,' clearly indicates that it refers to actions to be commenced after its passage. In addition, also, it is a general proposition of law that statutes will not be given a retroactive effect or apply to pending cases, unless they relate to procedure merely, or are so expressed in the act. As said by Mr. Justice Clifford in *Twenty Per Cent. Cases*, 20 Wall. 187, 22 L. Ed. 339: 'Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms.' I am of the opinion that the amendment of 1910 was not retroactive, and did not confer jurisdiction upon this court over the defendant. Had plaintiff elected to proceed without amendment of his statement or declaration, the benefits which he hoped to have by reason of the employer's liability act, which are unnecessary to be stated, might have been lost to him. He insisted upon the amendment, and as well asserts that the original statement sets forth a cause of action under the statute. The jurisdiction sought was not founded only upon diverse citizenship. * * *

An act of the Indiana Legislature of 1853 (Acts of 1853, p. 113) authorized suits to be brought before a justice of the peace

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only, and hence the recovery was limited to \$100; but by the amendatory act (Acts 1859, p. 105), where the damages exceed \$50, the party may bring this suit in the circuit or common pleas court, and recover the value of the animal killed or injury inflicted. In the opinion it is said (*Indianapolis & Cincinnati R. Co. v. Kercheval*, 16 Ind. 88):

"The language of the amendment, so far as it indicates any legislative intent in respect to the question now under consideration, is as follows: 'That whenever any animal or animals shall be killed or injured by the cars or locomotives, or other carriages, used on any railroad in this state, the owner thereof may go before some justice of the peace,' etc. The language here employed seems to be clear and explicit. The amendment applies only to such animals as 'shall be' killed. 'Shall be' clearly indicates the future, and not the past. There is nothing in the amendment which indicates, so far as we can discover, an intent on the part of the Legislature to make it retrospective, and embrace animals previously killed. This court has in two instances at least indicated the rule of construction in this respect. Thus: 'It is a well-settled principle of law that the courts are to give statutes a prospective operation, where there is nothing indicating a different intention on the part of the Legislature which enacted the statutes.' *Pritchard v. Spencer*, 2 Ind. 486. Again: 'Statutes are to be considered prospective, unless the intention to give a retrospective operation is clearly expressed; and not even then, if, by such construction, the act would divest vested rights.' *Aurora, etc.; Turnpike Co. v. Holthouse*, 7 Ind. 60."

See, also, *Wright v. Southern Ry. Co. et al.* (C. C.) 80 Fed. 260; *Ranney v. Bostic*, 15 Mo. 216; *Murray v. Gibson*, 15 How. 421, 14 L. Ed. 755; *N. Y. & O. M. R. Co. v. Van Horn*, 57 N. Y. 477; *McEwen et al. v. Dem et al.*, 24 How. 242, 16 L. Ed. 672; *Rolater v. Strain*, 31 Okla. 58, 119 Pac. 992; *Good et al. v. Keel et al.*, 29 Okla. 325, 116 Pac. 777.

The cases of *MaHarry v. Eatman*, 29 Okla. 46, 116 Pac. 935, and *Harris v. Gale* (C. C.) 188 Fed. 712, do not militate against the rule announced by the foregoing cases. This court, as well as the United States Court for the Eastern District of this state, reached the conclusion therein expressed not only from the language and the context of the entire act, its subject-matter,

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purpose, application, etc., but also from its prior contemporaneous construction by the Interior Department. The proviso of section 6 of the act of May 27, 1908, passed on in said cases by this court and the federal court for the Eastern district of this state, was solely remedial. Such statutes, as a rule, receive a liberal and expansive application at the hands of courts to correct innocent mistakes, cure irregularities in proceedings or give effect to the acts according to the intent thereof. That rule was applied in *MaHarry v. Eatman*, *supra*, and *Harris v. Gale*, *supra*.

Does the petition state a cause of action under the terms of the Employer's Federal Liability Act (Act Cong. April 22, 1908), entitled: "An act relating to the liability of common carriers by railroad to their employees in certain cases" (chapter 149, 35 St. at L. 65 [U. S. Comp. St. Supp. 1911, p. 1322])? Said act is as follows:

"Section 1. That every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states and territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable to damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Sec. 2. That every common carrier by railroad in the territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if

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none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment.

"Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

"Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

"Sec. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, that in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

"Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

"Sec. 7. That the term 'common carrier' as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

"Sec. 8. That nothing in this act shall be held to limit the duty or liability of common carriers or to impair the rights of

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their employees under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress entitled 'An act relating to liability of common carriers in the District of Columbia and territories, and to common carriers engaged in commerce between the states and between the states and foreign nations to their employees,' approved June eleventh, nineteen hundred and six."

Act April 5, 1910, amending the foregoing act (chapter 143, 36 St. at L. 291 [U. S. Comp. St. Supp. 1911, p. 1325]), is as follows:

"That an act entitled 'An act relating to the liability of common carriers by railroad to their employees in certain cases' approved April twenty-second, nineteen hundred and eight, be amended in section six so that said section shall read:

"'Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

"'Under this act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.'

"Sec. 2. That said act be further amended by adding the following section as section nine of said act:

"'Sec. 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.'"

In *Employer's Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, it is said:

"So far as the face of the statute is concerned, the argument is this: That because the statute says carriers engaged in commerce between the states, etc., therefore the act should be interpreted as being exclusively applicable to the interstate commerce business, and none other, of such carrier, and that the words 'any employee,' as found in the statute, should be held to

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mean any employee when such employee is engaged only in interstate commerce. * * * If we could bring ourselves to modify the statute by writing in the words suggested, that is, by causing the act to read 'any employee when engaged in interstate commerce,' we would restrict the act as to the District of Columbia and the territories, and thus destroy it in an important particular. To write into the act the qualifying words, therefore, would be but adding to its provisions in order to save it in one aspect, and thereby to destroy it in another; that is, to destroy in order to save, and to save in order to destroy."

In *Hyde v. Southern R. Co.*, 31 App. D. C. 466, referring to the foregoing case, it is said:

"Necessarily all that was actually decided in that case was that, in so far as the act relates to carriers engaged in business in the states, it is repugnant to the Constitution, in that it applies to all employees, whether engaged or not in interstate commerce at the time of injury, and that it cannot be restricted, by construction, to employees engaged in interstate commerce alone, in order to save its constitutionality."

In *El Paso & Northeastern Ry. Co. v. Enequina Gutierrez*, 215 U. S. 87, 30 Sup. Ct. 21, 54 L. Ed. 106, referring to the *Employer's Liability Cases*, *supra*, it is said:

"In that case this court held that, conceding the power of Congress to regulate the relations of employer and employee engaged in interstate commerce, the act of June 11, 1906 (34 St. at L. 232, c. 3073, U. S. Comp. St. Supp. 1907, p. 891), was unconstitutional, in this: that in its provisions regulating interstate commerce Congress exceeded its constitutional authority in undertaking to make employers responsible not only to employees when engaged in interstate commerce, but to any of its employees, whether engaged in interstate commerce or in commerce wholly within a state."

In *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, it is said:

"(1) The term 'commerce' comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried on by water or by land.

"(2) The phrase 'among the several states' marks the distinction, for the purpose of governmental regulation, between commerce which concerns two or more states and commerce

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which is confined to a single state and does not affect other states, the power to regulate the former being conferred upon Congress and the regulation of the latter remaining with the states severally.

“(3) ‘To regulate,’ in the sense intended is to foster, protect, control, and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large.

“(4) This power over commerce among the states, so conferred upon Congress is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution. But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce.

“(5) Among the instruments and agents to which the power extends are the railroads over which transportation from one state to another is conducted, the engines and cars by which such transportation is effected, and all who are in any wise engaged in such transportation, whether as common carriers or as their employees.

“(6) The duties of common carriers in respect to the safety of their employees, while both are engaged in commerce among the states, and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power. * * * ‘Interstate commerce—if not always, at any rate when the commerce is transportation—is an act. Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable, or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not the right kind or quality, commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and, if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less ex-

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peditious, less reliable, less economical, and less secure. Therefore Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or in the exercise of a fair legislative discretion can be deemed to bear, upon the reliability or promptness or economy or security or utility of the interstate commerce act.' In view of these settled propositions, it does not admit of doubt that the answer to the first of the questions before stated must be that Congress, in the exertion of its power over interstate commerce, may regulate the relations of common carriers by railroad and their employees, while both are engaged in such commerce, subject always to the limitations prescribed in the Constitution, and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employees are engaged."

In *Southern R. Co. v. United States*, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72, it is said:

"The original act of March 2, 1893 (27 St. at L. 531, c. 196 [U. S. Comp. St. 1901, p. 3174]), imposed upon every common carrier 'engaged in interstate commerce by railroad' the duty of equipping all trains, locomotives, and cars used on its line of railroad in moving interstate traffic, with designated appliances calculated to promote the safety of that traffic and of the employees engaged in its movement; and the second section of that act made it unlawful for 'any such common carrier' to haul or permit to be hauled or used on its line of railroad any car 'used in moving interstate traffic' not equipped with automatic couplers capable of being coupled and uncoupled without the necessity of a man going between the ends of the cars. Act March 2, 1903 (32 St. at L. 943, c. 976 [U. S. Comp. St. Supp. 1909, p. 1143]), amended the earlier one and enlarged its scope by declaring, *inter alia*, that its provisions and requirements should 'apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith. * * *' The real controversy is over the true significance of the words 'on any railroad engaged' in the first clause of the amendatory provision. But for them the true test of the application of that clause to a locomotive, car, or similar vehicle would be, as it was under the original act, the use of the vehicle in moving interstate traffic. On the other hand, when they are given

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their natural signification, as presumptively they should be, the scope of the clause is such that the true test of its application is the use of the vehicle on a railroad which is a highway of interstate commerce, and not its use in moving interstate traffic. And so certain is this that we think there would be no contention to the contrary were it not for the presence in the amendatory provision of the third clause—'and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith.' In this there is a suggestion that what precedes does not cover the entire field; but, at most, it is only a suggestion, and gives no warrant for disregarding the plain words, 'on any railroad engaged' in the first clause. True, if they were rejected, the two clauses, in the instance of a train composed of many cars, some moving interstate traffic and others moving intrastate traffic, would by their concurrent operation bring the entire train within the statute. But it is not necessary to reject them to accomplish this result, for the first clause, with those words in it, does even more; that is to say, it embraces every train on a railroad which is a highway of interstate commerce, without regard to the class of traffic which the cars are moving. The two clauses are in no wise antagonistic, but, at most, only redundant; and we perceive no reason for believing that Congress intended that less than full effect should be given to the more comprehensive one, but, on the contrary, good reason for believing otherwise. As between the two opposing views, one rejecting the words 'on any railroad engaged' in the first clause, and the other treating the third clause as redundant, the latter is to be preferred, first, because it is in accord with the manifest purpose, shown throughout the amendatory act, to enlarge the scope of the earlier one and to make it more effective, and, second, because the words which it would be necessary to reject to give effect to the other view were not originally in the amendatory act, but were inserted in it by way of amendment while it was in process of adoption (Cong. Rec. 57th Cong., 1st Sess. vol. 25, pt. 7, p. 7300; *Id.*, 2d Sess. vol. 36, pt. 3, p. 2268), thus making it certain that without them the act would not express the will of Congress. * * * We come, then, to the question whether these acts are within the power of Congress under the commerce clause of the Constitution, considering that they are not confined to vehicles used in moving interstate traffic, but embrace vehicles used in moving intrastate traffic. The answer to this question depends upon another, which is: Is there a real or substantial relation or connection between what is required by these acts in respect of vehicles used in moving intrastate

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traffic, and the object which the acts obviously are designed to attain, namely, the safety of interstate commerce and of those who are employed in its movement? Or, stating it in another way: Is there such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intrastate as well as to those used in moving that which is interstate? If the answer to this question, as doubly stated, be in the affirmative, then the principal question must be answered in the same way. And this is so, not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary, and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce. Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car, and, when this is not the case, the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen, and like employees, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent; for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains. And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train, but to others. * * *

Employer's Liability Act June 11, 1906 (34 St. at L. 232, c. 3073 [U. S. Comp. St. Supp. 1907, p. 891]), having been held to be violative of the federal Constitution and not authorized by the powers granted to the federal government by the interstate

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commerce clause (par. 3, sec. 8, art. 1, Const. of United States) on the ground that it included any employee of every common carrier engaged in interstate commerce, so far as it related to the states, it being assumed in said opinion that, if the act read, "An employee when engaged in interstate commerce," it would be valid, in the light of that opinion the act of April 22, 1908, was passed wherein it is provided that "every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury, while he is employed by such carrier in such commerce, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The plaintiff, in his petition, alleged that he was a resident citizen of Okfuskee county, in this state, and that the defendant was a corporation existing under the laws of the state of Arkansas for the purpose of building, equipping, and operating a line of railway from Ft. Smith, Ark., to Guthrie, Okla., said line running through said county. He further alleged:

"That on and before the 21st day of May, A. D. 1909, this plaintiff was in the employ of said defendant company, as one of the employees on a work train of the said defendant company, and that plaintiff's duties were to assist in ditching the sides of the track, and removing the dirt to fills, and doing such other things connected with the work as he was told to do by the defendant's foreman in charge of said work train, and at the time there were eight other men besides plaintiff working with that train; that on May the 21st, A. D. 1909, between the towns of Boley and Castle, in said county and state, this plaintiff and the other work hands on said train were engaged in the same common employment of fixing and repairing the track of the said line of railroad of the said defendant company at said point, and that this plaintiff and said workers were at the said time and place, under the direction and control of one * * * Flecenstine, whose initials are to this plaintiff unknown, who was at that time the conductor of said train, and the foreman of this plaintiff and the other workers on said defendant's work train.

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* * * That on the said 21st day of May, 1909, and at said place, and while in the proper exercise and discharge of his duties under such employment, plaintiff and the one who worked with him in handling the tackle block up next to the plow that was used on defendant's cars to unload dirt from said cars were ordered and directed by said foreman to get upon the cars, and move that said tackle block three cars ahead. That, in obedience of said order from said conductor of said train, this plaintiff quit his place in the clear on the ground by side of the car, and mounted the car on which the tackle block was fastened, and stooped to unfasten the chain holding said tackle block to the side of said car, stooping down to unfasten the chain, found the cable caught, and asked the conductor to signal the engineer in charge of the engine to back up and give slack, so plaintiff could unloose the said chain, and that the conductor gave such signal to back up, or he should have given it, and in place of doing that the said conductor either signaled the engineer to go ahead, or the engineer mistook the conductor's signal, and the engineer did jerk the engine ahead, thus jerking the plow to which the cable was attached up near the block where this plaintiff was standing, and brake the defective and rotten chain that was holding the tackle block and cable to said car, and in some way the said tackle block or cable struck this plaintiff on his right leg, breaking it in four places."

In *Newell v. Baltimore & O. R. Co.*, *supra*, it is said:

"The action is brought to recover damages for personal injuries alleged to have resulted from the negligence of the defendant. The suit was brought on March 5, 1910. The statement then filed set forth nothing from which an inference could be drawn that the action was not an ordinary common-law action. This being so, and there being a diversity of citizenship alleged, this court clearly had jurisdiction at the time suit was brought. It is true that in the original statement of the plaintiff's case the words 'interstate traffic' were used, but their use was apparently for the purpose of describing certain cars by which the plaintiff alleged he was injured, and not as descriptive of the employment of the plaintiff. After the general issue had been pleaded, and after the case was upon the trial list, the court permitted the plaintiff to amend his original statement by the addition of the following words: 'Plaintiff avers that on May 6, 1909, and for some time previous thereto, he was employed by the defendant in the capacity of a freight brakeman, and, being so as aforesaid in the service of defendant, he was on said date engaged in the performance of his duties as such in interstate commerce work, and,

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while he was as aforesaid engaged, it became necessary in conducting the defendant's business for the crew of which he was a member to place several freight cars used and engaged in interstate traffic on a certain siding or side track of defendant's situate in its railroad yards in the borough of Connellsville, Fayette county, Pa.' It will thus be seen that what had been the common-law action of the plaintiff became by the amendment an action under the act of Congress approved April 22, 1908, commonly called 'Employer's Liability Act,' entitled 'An act relating to the liability of common carriers to their employees in certain cases.' * * * When the case was reached for trial, and before the jury was selected and sworn, counsel for the defendant moved the court to dismiss the action for want of jurisdiction upon the ground that it appeared from the pleadings that the controversy is one arising under the Constitution and laws of the United States. It was urged by plaintiff's counsel at that time, and at the time of the argument of this motion, that the suit was brought for the purpose of having the benefit of the federal statutes, that the question of jurisdiction should have been raised at once by the defendant, and, that not having been done, the jurisdiction was waived. To this assent could not be given because the original statement of claim gave no notice of plaintiff's intention to have the benefits of the federal act, and the defendant at the first convenient time after the amendment, which for the first time set out the plaintiff's purpose, raised the question of jurisdiction."

Obviously, under said petition, the plaintiff was not "employed by" defendant "while engaged in commerce between any of the several states," and therefore this action does not come either within the provision of the act of April 22, 1908, or April 5, 1910.

The cause is reversed and remanded, with instructions to allow the application for removal.

All the Justices concur.

St. Clair v. Hufnagle et al.

ST. CLAIR v. HUFNAGLE *et al.*

No. 3597. Opinion Filed January 28, 1913.

(131 Pac. 171.)

APPEAL AND ERROR—Case-Made—Time for Filing—Review. A motion for a new trial being overruled on February 11, 1911, the petition in error with case-made attached was filed with the clerk of this court on February 13, 1912. **Held**, that this court has no jurisdiction to entertain same.

(Syllabus by the Court.)

*Error from Comanche County Court;
James H. Wolverton, Judge.*

Action between P. L. St. Clair and August Hufnagle and others. From a judgment of the court below, P. L. St. Clair brings error. Dismissed.

Chas. C. Black, for plaintiff in error.

R. J. Ray, for defendants in error.

WILLIAMS, J. Counsel for defendants in error moves to dismiss this proceeding in error on the ground that "more than one year elapsed after final judgment in the trial court and before the petition in error was filed in the Supreme Court; that the motion for a new trial was overruled in the trial court on the 11th day of February, 1911, and the petition in error was filed in the Supreme Court on the 13th day of February, 1912."

The record bears out the contention of the defendants in error. The motion to dismiss is sustained. *Richardson et vir v. Beidleman et al.*, 33 Okla. 463, 126 Pac. 816.

All the Justices concur.

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DEMING INV. CO. v. BRUNER OIL CO. *et al.*

No. 2057. Opinion Filed February 3, 1913.

INDIANS—Creek Allotment—Descent and Distribution. Where a member of the Creek Tribe of Indians, entitled to be enrolled under section 21 of act of Congress approved June 28, 1899, entitled, "An act for the protection of the people of the Indian Territory and for other purposes" (30 St. at L. p. 495), died subsequent to the first day of April, 1899, but before having received the allotment of lands to which he was entitled as a member of said tribe of Indians, said lands, by reason of section 28 of the Original Treaty with the Creek Tribe of Indians (31 St. at L. p. 861), descended to his heirs, free from restrictions upon alienation imposed by section 7 of said Original Creek Treaty and by section 16 of the Supplemental Treaty with the Creek Tribe of Indians (32 St. at L. p. 500), and a warranty deed, executed by the heirs after the allotment of said lands to them, conveyed the fee simple title thereto.

(Syllabus by the Court.)

Error from District Court, Tulsa County;
L. M. Poe, Judge.

Action by the Deming Investment Company against the Bruner Oil Company and the Payne Oil Company. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions.

Biddison & Campbell, for plaintiff in error.

Benjamin F. Rice and *Thomas D. Lyons*, for defendants in error.

HAYES, J. Plaintiff in error brought this action in the court below to quiet its title to 40 acres of land situated in Tulsa county. The cause was tried to that court upon an agreed statement of facts, the substance of which we here state: Martha Hohlahta, who was a full-blood citizen of the Creek Nation, died in May, 1899, at the age of two years. She left no surviving brothers or sisters or descendants of such, and left as her only heirs at law her father and mother, Cheparn and Lucy Hohlahta, who were also full-blood citizens of the Creek Nation. On the

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6th day of April, 1904, said Martha Hohlahta was enrolled by the Commission to the Five Civilized Tribes as a full-blood Creek Indian, and the lands in controversy were allotted to the heirs of deceased as her homestead on the 13th day of the following July, and a certificate issued to them. Subsequently, a patent, executed by the chief of the Muskogee or Creek Nation and approved by the Secretary of the Interior conveying said 40 acres of land to the heirs and designating the same as a homestead, was filed for record with the Commission to the Five Civilized Tribes. On the 27th day of May, 1905, the said Cheparn and Lucy Hohlahta executed and delivered their warranty deed to one Charles W. Lefler, conveying said lands. On the 18th day of January, 1906, Lefler executed and delivered his warranty deed conveying the same lands to one J. C. Eddy, who took the title thereto as trustee for plaintiff in error, and who thereafter conveyed by warranty deed the lands to plaintiff in error. All of the deeds mentioned herein were duly recorded prior to the time of the execution of the leases sought to be canceled by this action. On the 15th day of April, 1907, Cheparn and Lucy Hohlahta executed and delivered an oil and gas mining lease on part of the land to defendant Bruner Oil Company, and on the same day they executed a similar lease on a part of the land to the Payne Oil Company, both of which leases have been duly recorded. Said leases constitute the cloud upon plaintiff's title of which it now complains.

It is agreed that at the time of the death of the said Martha Hohlahta the laws of the Creek Nation governed the descent of her allotment, and that pursuant to those laws, Lucy Hohlahta, the mother of deceased, was the sole heir to inherit the land in controversy. The question of law this proceeding presents is a construction of the provisions of the treaty with the Creek Tribe of Indians under which the allotment was made to the heirs of the deceased Martha Hohlahta.

Section 16 of the treaty of the United States with the Creek Tribe of Indians (32 St. at L. p. 500), generally known as the Supplemental Treaty with the Creek Tribe of Indians, provides:

"Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy

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any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment 40 acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for 21 years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear. Selections of homesteads for minors, prisoners, convicts, incompetents and aged and infirm persons, who cannot select for themselves, may be made in the manner provided for the selection of their allotments, and if for any reason such selection be not made for any citizen it shall be the duty of said commission to make selection for him. The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, but if he have no such issue, then he may dispose of his homestead by will, free from the limitation herein imposed, and if this be not done, the land embraced in his homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise prescribed. Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

The foregoing section is substantially the same as section 7 of the Original Creek Treaty (31 St. at L. p. 861), to which the treaty of 1902 was amendatory and supplementary. It is contended by defendants in error that by virtue of the first sentence of the foregoing section of the treaty no land allotted to any citizen of the Creek Tribe of Indians could be alienated at any time before the expiration of five years from the ratification of that treaty, except with the approval of the Secretary of the Interior. The deed from the heirs of deceased, Martha Hoh-lahta, to the person from whom plaintiff derails its title was executed before the expiration of five years from the ratification of said agreement, and was never approved by the Secretary of the Interior; but said lands were not allotted to the heirs of deceased by virtue of this section, or by virtue of any preceding

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section of the treaty. Section 28 of the Original Treaty, in part, provides:

“All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section 21 of the act of Congress approved June 28, 1898, entitled ‘An act for the protection of the people of the Indian Territory, and for other purposes,’ shall be placed upon the rolls to be made by said commission under said act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.”

It was under the foregoing section that the lands in controversy were allotted and patented to the heirs of deceased. It is contended, however, by defendants in error that the five years’ restriction upon alienation imposed by section 16 of the Supplemental Treaty applies to the heirs of citizens who died before allotment was made, as well as to heirs of citizens to whom allotments were made before their death. The recent case of *Mullen et al. v. United States*, 224 U. S. 448, 56 L. Ed. 834, although the foregoing provisions of the Creek Treaty were not directly involved in that case, sheds some light upon its construction. The court had under consideration in that case certain provisions of the Chickasaw and Choctaw Treaty with the United States, imposing restrictions upon the alienation of lands allotted to members of those two tribes of Indians. Section 12 of said treaty (32 St. at L. p. 641, c. 1362) requires each member of the tribe at the time he selects an allotment to designate a homestead out of his allotment, which is made inalienable during the lifetime of the allottee, not exceeding 21 years from the date of certificate of allotment. Section 16 provides that all lands allotted to members of the tribe, except such land as is set aside to each for a homestead, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year; one-fourth in acreage in three years; and the balance in five years, in each case

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from date of patent. Section 22 of the same treaty reads in part as follows:

"If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this agreement and before receiving his allotment of land, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter 49 of Mansfield's Digest of the Statutes of Arkansas."

The question involved in that case was whether lands allotted in the name of deceased Indians under the foregoing provisions of section 22 were subject to the restrictions upon alienation imposed by sections 12 and 16. In holding that such restrictions did not apply to the lands allotted to deceased members of the tribe, the court, speaking through Mr. Justice Hughes, who delivered the opinion, made reference in the opinion to the provisions of the Creek treaties here involved, and to an opinion given to the Interior Department by the then Assistant Attorney General for the Interior Department (now Mr. Justice Van Devanter), in which he said:

"After a careful consideration of the provisions of law pertinent to the question presented, and of the views of the Commissioner of Indian Affairs and the Commission to the Five Civilized Tribes, I agree with the latter that in all cases where allotment is made directly to an enrolled citizen, it is necessary that a homestead be selected therefrom and conveyed to him by separate deed; but that where the allotment is made directly to the heirs of a deceased citizen, there is no reason or necessity for designating a homestead out of such lands, or of giving the heirs a separate deed for any portion of the allotment, and therefore advise the adoption of that rule."

This language of the Assistant Attorney General is quoted with approval and made the basis of the court's reasoning by analogy to the conclusion it reached in the application of the Chickasaw and Choctaw Agreement; and in speaking of the provisions of Creek, Chickasaw and Choctaw treaties, after noticing a slight difference in the language thereof, the court said:

"In both cases the lands were to go immediately to the heirs, and the mere circumstance that under the language of the statute

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the allotment was made in the name of the deceased ancestor (referring to the Chickasaw and Choctaw Treaty) instead of the names of the heirs, furnishes no reason for implying a requirement that there should be a designation of a portion of the lands as homestead."

This expression of that court should be taken as high authority, if not decisive, that the portion of section 7 of the Original Creek Agreement and of section 16 of the Supplemental Creek Agreement, *supra*, requiring the selection of a homestead of 40 acres by each citizen out of his allotment and imposing restrictions upon its alienation for a period of 21 years, has no application to allotments made under section 28; and if those sections apply at all to allotments made under section 28, they do so only in part. But there is no language in either section 7 of the Original Treaty or in section 16 of the Supplemental Treaty, or in section 28, specifically expressing an intent that any of the provisions of the two first-named sections shall apply to allotments made under the last section to the heirs of persons who died subsequent to the first day of April, 1899, but before receiving their allotments. Two classes of allotments of land are provided for by the treaty: first, an allotment to each member of the tribe that he is entitled to receive because of his membership in the tribe and his interest in the tribal property; and, second, an allotment which the treaty deems just for the heirs to receive, not because they are members of the tribe, but because they are heirs of a person who would have been entitled to take an allotment had he lived until the ratification of the treaty. It was with the former of these classes of allotments, we think, section 16 of the Supplemental Treaty and its counterpart, section 7 of the Original Treaty, intended to deal, and that it intended to divide the lands embraced in such allotments into two classes: consisting of those upon which there is a restriction upon the alienation for a period of five years from the ratification of the treaty, and of those upon which there is restriction upon the alienation for a period of 21 years; but section 28 provides for no such division of the lands allotted thereunder, and makes no reference to restrictions upon the alienation thereof. An Indian having died before taking an allotment, the land he

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was entitled to receive as his allotment descends directly to his heirs under the law of descent and distribution named, and shall be allotted and distributed to them accordingly. The land allotted to the heirs of deceased is neither homestead nor surplus; and there is no more reason for applying the restrictions upon alienation of the surplus to this entire allotment than there is to apply the restrictions upon the alienation of homesteads.

Our attention has been called to the fact that the views we here express are in conflict with decisions of this court in *Barnes v. Stonebraker*, 28 Okla. 75, 113 Pac. 903, and *Sanders v. Sanders et al.*, 28 Okla. 58, 117 Pac. 338. After a more thorough consideration of the treaty provisions involved, and in the light of the expressions of the Supreme Court of the United States in *Mullen et al. v. United States*, *supra*, whose decisions on these questions are controlling, we are of the opinion that in so far as said cases are in conflict with the views herein expressed, the same should, in harmony with the decision of this court in *Rentie et al. v. McCoy et al.*, *ante*, be overruled.

It follows that the judgment of the trial court should be reversed and the cause remanded, with direction to enter judgment in accordance with this opinion.

All the Justices concur.

COLUMBIA BANK & TRUST CO. v. SOUTHERN
SURETY CO.

No. 1371. Opinion Filed September 13, 1910.

Rehearing Denied February 4, 1913.

PRINCIPAL AND SURETY—Former Decision Followed. The syllabus in this case is the same as that of *Columbia Bank & Trust Co. v. United States Fidelity & Guaranty Co.*, 33 Okla. 535, 126 Pac. 556.

(Syllabus by the Court.)

Error from District Court, Oklahoma County;
George W. Clark, Judge.

Fife et al. v. Cornelous et al.

Proceedings by E. B. Cockrell, Bank Commissioner, to wind up the affairs of the Columbia Bank & Trust Company. On application of the Bank Commissioner for an order of sale, the Southern Surety Company filed a petition in intervention. From a judgment for intervener, the Bank Commissioner brings error. Reversed and remanded.

Ledbetter, Stuart & Bell, for plaintiff in error.

J. H. Huckleberry and Hutchings & German, for defendant in error.

KANE, J. The questions raised in this proceeding in error are the same as those decided in *Columbia Bank & Trust Co. v. United States Fidelity & Guaranty Co.*, 33 Okla. 535, 126 Pac. 556. Upon the authority of that case, the judgment of the court below is reversed and the cause remanded.

DUNN, C. J., and TURNER, J., concur; WILLIAMS and HAYES, JJ., disqualified, and not participating.

FIFE et al. v. CORNELOUS et al.

No. 2304. Opinion Filed May 14, 1912.

Rehearing Denied February 4, 1913.

(124 Pac. 957.)

1. **APPEAL AND ERROR—Service of Case-Made.** The party desiring to have a judgment or order reviewed by the Supreme Court must prepare and serve his case-made on the opposite party within three days after the judgment or order is entered; and, unless the case is served within that time or within an extension of time allowed by the court or judge within such time, the case will not be considered in this court.
2. **SAME—Record—Sufficiency.** A purported order of the trial judge extending the time in which to make and serve a case-made is without force where the case-made fails to show affirmatively that such order was made and is entered of record.

(Syllabus by the Court.)

Error from District Court, Okmulgee County;
W. L. Barnum, Judge.

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Action by Chapman Fife and Gibson Fife, by their guardian, against William D. Cornelous and others. From the judgment, Chapman Fife and Gibson Fife bring error. Dismissed.

Holcomb & Hall, for plaintiffs in error.

Moore & Noble and *John E. Turner*, for defendants in error.

KANE, J. This cause comes on to be heard upon the motion of the defendant in error William D. Cornelous to dismiss the appeal of the plaintiffs in error, upon the ground, among others, that the plaintiffs in error did not serve upon the defendant in error, William D. Cornelous, the case-made within three days from the rendition of the judgment appealed from, as required by section 6074, Comp. Laws 1909, nor did the court or the judge thereof extend the time to plaintiffs in error for making and serving case-made as provided by section 6075 of the same statute. The motion must be sustained. It is well settled that the party desiring to have a judgment or order reviewed by the Supreme Court must prepare and serve his case-made on the opposite party within three days after the judgment or order is entered, and, unless the case is served within that time or within an extension of time allowed by the court or judge within such time, the case will not be considered in this court. The court has no power to grant an extension of time to serve a case after the expiration of the time allowed by statute, unless within that time an extension has been given which has not expired. A case served after the time for serving has expired is of no validity. *Board of Commissioners of Garfield Co. v. Porter et al.*, 19 Okla. 173, 92 Pac. 152. It is also well settled that a purported order of the trial judge extending the time in which to make and serve a case-made is without force where the case-made fails to show affirmatively that such order was made and is entered of record. *Springfield Fire & Marine Ins. Co. v. Gish & Co.*, 23 Okla. 824, 102 Pac. 708.

The appeal is dismissed.

All the Justices concur.

Lankford, State Bank Com'r, v. Oklahoma Engraving & Printing Co.

LANKFORD, *State Bank Com'r*, v. OKLAHOMA ENGRAVING & PRINTING CO.

No. 2379. Opinion Filed February 4, 1913.

(130 Pac. 278.)

BANKS AND BANKING—**State Banks—Guaranty Fund—Insolvency.**
Reversed and remanded upon the authority of *Columbia Bank & Trust Co. v. United States Fidelity & Guaranty Co.*, 33 Okla. 535, 126 Pac. 556.

(Syllabus by the Court.)

Error from District Court, Oklahoma County;
Geo. W. Clark, Judge.

Intervention by the Oklahoma Engraving & Printing Company in action by State Bank Commissioner to wind up affairs of insolvent state bank. Judgment for intervener, and the Commissioner brings error. Reversed and remanded, with directions.

Ledbetter, Stuart & Bell, for plaintiff in error.

Wilson & Tomerlin and *E. E. Buckholts*, for defendant in error.

KANE, J. This is an appeal from an order of the court below, whereby it enjoined the State Bank Commissioner, who was administering the affairs of the insolvent Columbia Bank & Trust Company, from preferring the depositors' guaranty fund over what is called a "merchandise creditor" in the distribution of the assets of the defunct bank. Counsel for the defendant in error, who was a creditor of the bank by virtue of sales of supplies made prior to its insolvency, state their position in their brief as follows:

"We concede that the depositors' guaranty fund is a fund for the sole payment of depositors in failed banks, and we concede here that the intervener, as a merchandise creditor of such failed bank, has no right to participate in said fund, or along with the depositors. We do, however, claim that a merchandise creditor, as intervener is in this case, is a creditor of the bank, and entitled

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to prorate with the deposit creditors of the bank and all other creditors in the assets of said failed bank; that, upon the failure of the bank, the assets of such bank come into the hands and possession of the Bank Commissioner, not for the purpose of paying any favored creditor, but for the purpose of being pro rata distributed and conserved as a trust fund for the purpose of such pro rata distribution to creditors."

The question raised by counsel is somewhat similar to the one decided by this court in the case of *Columbia Bank & Trust Co. v. United States Fidelity & Guaranty Co.*, 33 Okla. 535, 126 Pac. 556. In that case the surety company sought to compel the Bank Commissioner to discharge the liability of its principal, for which otherwise it would be bound, out of the depositors' guaranty fund. The court held that that could not be done, and in defining the status of a surety, under conditions created by the bank guaranty law, says:

"* * * With the exception of the first lien of the state upon the assets, etc., of the insolvent state banks created by section 323, *supra*, for the benefit of the depositors' guaranty fund, the rights and liabilities of the surety company are the same as they would have been if the bond was executed to secure the deposit of a part of the permanent school fund in any bank or trust company within or without the state, not governed by the bank guaranty law."

This reasoning applies to the defendant in error herein, who was not a creditor of the bank in the sense that a depositor was, and hence admittedly not entitled to be paid out of the depositors' guaranty fund. The depositors' guaranty fund was created for the payment of depositors, only as defined in *Columbia Bank & Trust Co. v. United States Fidelity & Guaranty Co.*, *supra*. Section 323, Comp. Laws 1909, provides that the state shall have, for the benefit of the depositors' guaranty fund, a first lien upon the assets of any defunct bank or trust company, and all liabilities against the stockholders, officers, or directors thereof, and against all other persons, corporations, or firms; and that such liabilities may be enforced by the state for the benefit of the depositors' guaranty fund. The effect of this statute is to make the state a preferred creditor until any deficiency in the guaranty fund, created by the payment therefrom of the depositors of an

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insolvent bank, is made up. After that, any remaining assets of the bank become available for the purpose of being prorated and distributed among the general creditors of the bank, in the manner contended for by counsel for defendant in error.

The judgment of the court below is accordingly reversed, and the cause remanded, with directions to proceed in conformity with the views herein expressed.

All the Justices concur.

LORENSEN *et al.* v. J. H. CONRAD & CO.

No. 3071. Opinion Filed January 9, 1912.

Rehearing Denied February 4, 1913.

(129 Pac. 732.)

APPEAL AND ERROR—Case-Made—Service. Where a case-made is not served upon the defendant in error or its counsel within three days after the motion for a new trial was overruled, nor within the extension of time granted by the trial court, the appeal must be dismissed.

(Syllabus by the Court.)

*Error from Superior Court, Grady County;
Will, Linn, Judge.*

Action between Jacob Lorenson and another and J. H. Conrad & Co. From a judgment in favor of the latter, the former bring error. Dismissed.

Thomas J. O'Neill, for plaintiffs in error.

Barefoot & Carmichael, for defendant in error.

KANE, J. There is a motion to dismiss the appeal in the above-entitled cause, upon the ground, among others, "that the case-made was not served upon the defendant in error or its counsel within three days after the motion for a new trial was overruled, as provided by law, and was not served upon the defendant in error or its counsel within the extension of time granted

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by the trial court for the plaintiffs in error to prepare and serve the case-made."

The record shows that the case-made was not served until three days after the expiration of the time granted by the court to the plaintiffs in error to prepare and serve the case-made upon the defendant in error or its counsel. That is a sufficient ground for dismissal.

The appeal is dismissed.

All the Justices concur.

JONES *et al.*, Grady County Com'rs, v. LOUTHAN.

No. 3729. Opinion Filed February 4, 1913.

(130 Pac. 139.)

OFFICERS—Change of Salary. The judgment of the court below is affirmed upon the authority of **Board of County Com'rs v. Henry**, 33 Okla. 210, 126 Pac. 761.

(Syllabus by the Court.)

Error from District Court, Grady County;
Frank M. Bailey, Judge.

Action by M. B. Louthan against Ed. F. Johns and others, County Commissioners of Grady County. Judgment for plaintiff, and defendants bring error. Affirmed.

John H. Venable, for plaintiff in error.

R. D. Welborne, for defendant in error.

KANE, J. The only question involved herein is whether the salary of the defendant in error, who was elected sheriff of Grady county in November, 1907, was affected by the fee and salary bill which became effective some time after his election and qualification, and prior to the expiration of his term. It is admitted that, if the statute which was in force at the time of his election and qualification governs until the expiration of his term, he will be entitled to \$275 more than he would be if the

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later act applied. The court below took the view that, by virtue of that part of section 10, art. 23, of the Constitution, which provides that "in no case shall the salary or emoluments of any public official be changed after his election or appointment, or during his term of office," the salary of the sheriff was governed by the act in force at the time of his election and qualification. This is correct. It was so held by this court in *Board of County Com'rs v. Henry*, 33 Okla. 210, 126 Pac. 761.

Upon the authority of that case, the judgment of the court below must be affirmed.

All the Justices concur.

BLOCK *et al.* v. PATRICK, *County Treasurer.*

No. 1724. Opinion Filed February 11, 1913.

(130 Pac. 588.)

1. **MUNICIPAL CORPORATIONS—Local Improvements—Assessments.** The provisions of section 6 of the Organic Act of the territory of Oklahoma, providing that all property subject to taxation shall be taxed in proportion to its value, does not apply to assessments made against lots for the purpose of covering the cost of local improvements.
2. **SAME—Constitutional Law—Due Process of Law.** A statute that authorizes the trustees of an incorporated town, after notice to abutting property owners to construct sidewalks and guttering in front of their property and upon failure of such property owners to construct same, to construct such improvements and assess the cost thereof to the abutting property upon a frontage basis and to issue a tax warrant for the actual cost of labor and material obtained at the market price and used for such improvements, and making such tax warrant a lien against the property therein described, does not take property without due process of law and should not, upon that ground, be declared invalid.

(Syllabus by the Court.)

Error from District Court, Kingfisher County;

A. H. Huston, Judge.

Action by G. H. Block and others against James S. Patrick, County Treasurer of Kingfisher County. Judgment for defendant, and plaintiffs bring error. Affirmed.

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W. A. McCartney, for plaintiffs in error.

R. W. Wylie, F. L. Boynton, and Burwell, Crockett & Johnson, for defendant in error.

HAYES, C. J. Plaintiffs in error commenced this suit in the district court of Kingfisher county against defendant in error, as treasurer of that county, to enjoin the collection of certain special assessments of taxes made against plaintiffs' property to pay for the construction of guttering and sidewalks. The judgment in the court below denying to plaintiffs the relief they prayed for was rendered upon their petition and the answer of defendant thereto. As there is no controversy about the facts, it will be unnecessary to set out the pleadings *verbatim*.

In the month of November, 1902, the board of trustees of the town of Hennessey passed an ordinance authorizing and directing the construction of certain brick gutters and sidewalks in said town. On January 14, 1903, the board passed a second ordinance requiring the construction of sidewalks upon another street in said town. Plaintiffs own property abutting upon one or the other of the streets upon which the improvements were ordered to be made. After personal notice served upon them, plaintiffs failed to make the improvements provided for by the ordinances, and thereupon the city let the contract for their construction, and the construction of the improvements was completed, without objection on the part of plaintiffs until the city made and presented its tax bill for the cost of such improvements. It is conceded that the statute authorizes the board of trustees, after notice to the abutting property owners to make such improvements, and, upon their refusal to do so, to contract for the construction of the improvements, and to tax the cost thereof against the abutting property in proportion to the frontage of each piece of property.

The first proposition of law urged by plaintiffs in error is that the statute is void, because in violation of section 6 of the Organic Act of the territory, which, in part, provides that:

"No tax shall be imposed upon the property of the United States, nor shall the lands or property of nonresidents, * * * nor shall any unequal discrimination be made in taxing different

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kinds of property, but all property subject to taxation shall be taxed in proportion to its value."

It is urged that the statute violates this provision of the Organic Act, because the apportionment of the taxes for the cost of the improvements upon the abutting property is upon another basis than upon the value of the property. No lengthy consideration of this proposition is required. It has been determined against the contention of plaintiffs in *Jones et al. v. Holzappel et al.*, 11 Okla. 405, 68 Pac. 511, and *Riley v. Carico*, 27 Okla. 33, 110 Pac. 738.

One of the sections of the statute under which the town authorities proceeded provides that, when a special assessment shall be ordered against the lots of the abutting owners, ten days' written or printed notice shall be given by personal service to the owner or agent of each lot included. If, at the expiration of this notice, the improvements required to be made are not made, then the municipal authorities may issue tax warrants for the actual cost of labor and material obtained at the market price and used for such improvements. Such tax warrants shall be a lien against the property therein described. Section 435, Wilson's Rev. & Ann. St. 1903. The notice required by this section was given; but the statute does not provide for any notice or hearing upon the benefits that the abutting property owners will receive from the improvements, or upon the proportion of cost thereof that shall be taxed against such piece of property. It is contended by counsel for plaintiffs that, on account of the failure of the statute to provide notice to the property owners and an opportunity for hearing upon the assessment which shall be made against their property, plaintiffs are denied the due process of law guaranteed by the fourteenth amendment to the federal Constitution.

We think it is clear that the notice prescribed by the statute is only for the purpose of giving to the abutting property owners the option of constructing the proposed improvements themselves, rather than to leave it to be done by the municipality and the same be taxed up against their property. The statute provides for and contemplates no hearing upon the question of bene-

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fits to the abutting property that will result from the construction of the proposed improvements, or what proportion of the same shall be taxed against each piece of property; but we think the contention that the statute and the taxes assessed against plaintiffs' property thereunder are for these reasons invalid, has been determined against plaintiffs by different decisions of the federal Supreme Court.

In *Heman v. Allen*, 156 Mo. 334, 57 S. W. 559, the tax in question was levied against the property owners in a sewer district to pay for the construction of a district sewer. The charter of St. Louis, under which the sewer was constructed and the tax levied, provided that the district sewer might be established within the limits of any district to be prescribed by ordinance as approved by the board of public improvements, so as to connect with a public sewer, or some natural course of drainage; that the city assembly shall cause sewers to be constructed in the district whenever a majority of the property holders, residents therein, shall petition therefor, or whenever the board of public improvements shall recommend it necessary for sanitary or for other purposes. The charter neither provided for nor required that any notice or opportunity to be heard should be given to the property owners to determine the necessity of the construction of any such sewer; and when the sewer is completed, the assembly is authorized to compute the whole cost thereof and to assess it as a special tax against all lots of ground in the district, without regard to improvements, and in the proportion that their respective areas bear to the area of the whole district, exclusive of the public highway, and such tax, when proportioned and assessed against the property, constitutes a lien thereon. The property owners contended that the assessment of tax under that procedure took their property without due process of law, in that it afforded them no opportunity to be heard upon the question of benefits received by their property or upon the assessment of tax made against it. The judgment of the Supreme Court of the state, sustaining the validity of the tax, was affirmed on appeal by the Supreme Court of the United States. *Shumate v. Heman*, 181 U. S. 402, 45 L. Ed. 922. The decision in the fed-

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eral Supreme Court was based upon *French v. Barber Asphalt & Paving Co.*, 181 U. S. 324, 45 L. Ed. 879, which also originated in the courts of Missouri, and involved the validity of a paving tax. In the last-mentioned case, the court, at considerable length and with thoroughness, reviews all its former cases that shed light upon what constitutes due process of law as involved in the levying of taxes against property for the payment of local or special improvements. The tax levied in that case, the validity of which was attacked by the property owners, had been levied against the abutting property upon a front-foot basis to pay for paving a street. The charter of the city authorized the common council to declare the work of paving any street with a pavement of defined character to be necessary, whereupon such resolution was required to be published for ten days. Thereafter, the owners of a majority of front feet on that part of the street to be improved had the right within 30 days to file a remonstrance with the city clerk against the proposed improvements, and thereby divest the common council of the power to make the improvements. But the charter provided for no notice of any hearing upon the necessity of the improvements or of the benefits that might result therefrom to the abutting property. Plenary power was vested in the council to order the pavement of the street, unless that power was taken from the council by petition of opposition signed by the owners of a majority of front feet. The minority property owner had no opportunity for a hearing either as to the benefits the proposed improvement would result in to his property, or what proportion of the cost of the improvements should be taxed against his property. Whether the improvements should or should not be constructed under the charter of the city was determined either by the council or a majority of the property owners, without any hearing. What property was benefited and the proportion of the cost that such property should pay was determined by the provisions of the charter to be the property abutting upon the portion of the street paved, and that the cost should be apportioned in the same ratio as the frontage of any piece of property was to the total frontage upon the improvement. The court held that a tax levied under this procedure

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did not take property without due process of law. In the opinion the court quoted with approval from one of its former decisions the following:

"In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the Legislature of the state, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either like other taxes upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax and the class of lands which will receive the benefit and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of the commissioners. When the determination of the lands to be benefited is entrusted to commissioners, the owner may be entitled to notice and hearing upon the question whether their lands are benefited and how much. But the Legislature has the power to determine by the statute imposing the tax what lands which might be benefited by the improvement are in fact benefited; and if it does so, its determination is conclusive upon the owners, and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the Legislature has conclusively determined to be benefited. In determining what lands are benefited by the improvement, the Legislature may avail itself of such information as it deems sufficient, either through investigations by its committees, or by adopting as its own the estimates or conclusions of others, whether those estimates or conclusions previously had or had not any legal sanction."

In the same opinion the court also said:

"It was also said that the class of lands to be assessed for the purpose may be either determined by the Legislature itself, by defining a territorial district, or by other designation; or it may be left by the Legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited; that the rule of apportionment among the parcels of land benefited also rests within the discretion of the Legislature, and may be directed to be in proportion to the position, the frontage, the area or the market value of the lands, or in proportion to the benefits as estimated by commissioners."

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In the case last cited it was held that the due process of law guaranteed by the fourteenth amendment to the federal Constitution imposes upon the states, when exercising their powers of taxation, no more rigid or stricter curb than is imposed upon the federal government by the fifth amendment in a similar exercise of power.

Parsons v. District of Columbia, 170 U. S. 45, 42 L. Ed. 943, involves the application of the phrase "due process of law," as used in the fifth amendment, to an assessment levied for laying water mains in the District of Columbia, under the act of Congress that fixed the rate of assessment at \$1.25 per lineal front foot against all lots or lands abutting upon the street in which the water main was laid. The act invested the commissioners of the city with power to lay water mains and water pipes whenever the same in their judgment should be necessary for public safety, comfort or health, and provided for no notice to the property owners nor a hearing upon the necessity of the construction of any water main or upon the benefits that would result therefrom to the adjacent property. The court stated its conclusion in the following language:

"Our conclusion is that it was competent for Congress to create a general system to store water and furnish it to the inhabitants of the district, and to prescribe the amount of the assessment and the method of its collection; and that the plaintiff in error cannot be heard to complain that he was not notified of the creation of such a system or consulted as to the probable cost thereof. He is presumed to have notice of these general laws regulating such matters. The power conferred upon the commissioners was not to take assessments upon abutting properties, nor to give notice to the property owners of such assessments, but to determine the question of the propriety and necessity of laying water mains and water pipes, and of erecting fire plugs and hydrants, and their *bona fide* exercise of such a power cannot be reviewed by the courts."

Another case in point is *Webster v. Fargo*, 181 U. S. 394, 45 L. Ed. 912.

The Legislature, by the statute here involved, has itself determined and designated what property will be benefited by the construction of sidewalks and guttering in incorporated

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towns and villages. It is the property abutting on such improvements; and in fixing the proportion of the cost of the improvements that such property shall pay, the Legislature may be presumed to have determined to what extent at least such property will be benefited. It is not left to the discretion of the local officers to determine what property will be benefited or the extent thereof; and a notice to the property owners and a hearing thereon could avail nothing in determining the amount of the assessment that should be levied against the property of each, except to see that a correct application of the basis prescribed by the statute is made.

It is not contended here that any fraud was practiced by the board of trustees, or that any mistake was committed in the assessment levied. The sole contention is that the assessment is void.

In *City of Perry v. Davis et al.*, 18 Okla. 427, 90 Pac. 685, the Supreme Court of the territory, speaking through Mr. Justice Garber, upon a similar question, said:

"At this juncture it is contended that the above notice afforded the owners of property no opportunity to appear and be heard in the matter of fixing the amount of their individual assessments. This was not necessary. Section 7 of the act provides: 'As soon as any district sewer shall have been completed the city engineer, or other officer having charge of the work, shall compute the whole cost thereof, which shall also include all other expense incurred by the city in addition to the contract price of the work, and shall apportion the same against all the lots or pieces of ground in such district, exclusive of improvements, in proportion to the area of the whole district exclusive of public highways, and such officer shall report the same to the commissioner and councilmen, and the mayor and councilmen shall thereupon levy and assess a special tax by ordinance against each lot or piece of ground within the district. * * *' Of what avail would such an opportunity be where the Legislature has already fixed a mode of assessment which adjusts itself automatically, and where, after the cost of construction has been ascertained, the amount of the individual assessment is determined, not by a discretionary power, but by a mathematical calculation? In what way could a hearing affect the amount of the assessment, when the Legislature has said that the whole cost shall be apportioned against the lots in said district exclu-

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sive of improvements in proportion to the area? There is no valuation of property or of benefits, no exercise of discretionary power, no equalizing board, or board of appraisers, or commissioners—nothing but a mathematical calculation.”

It follows from these views that the judgment of the trial court should be affirmed.

All the Justices concur.

SCHECHINGER v. GAULT *et al.*

No. 1929. Opinion Filed February 11, 1913.

(130 Pac. 305.)

1. **FRAUDS, STATUTE OF—Agreements Relating to Realty—Appointment of Agent.** An agreement for the sale of real property, or of an interest therein, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, and subscribed by the party sought to be charged.
2. **SAME—Operation and Effect of Statute.** If a promisor or vendor is ready and willing to perform and carry out the sale of the land in accordance with his parol agreement, he cannot, as a rule, be compelled to give up or pay for the consideration received, on the sole ground that the agreement is invalid because of the statute of frauds, and cannot be compelled to perform.
3. **VENDOR AND PURCHASER—Rescission of Contract—Grounds—Fraud.** As a rule, one who has entered into a contract to purchase realty under the influence of fraudulent representations of the seller may rescind the contract and recover the purchase money if paid, or avoid its payment, if unpaid.
4. **SAME—Remedies of Purchaser—Recovery of Purchase Money Paid.** A petition, which alleges that G., the agent, represented to S., the vendee, that M., the vendor and principal, was the absolute owner in fee of the realty; that he (G.) as agent of said M. had full and complete authority to make and enter into a contract for said sale; that S. relied upon said representations made by G., the agent, and, believing them to be true, signed said agreement, and in accordance with its terms drew a draft on the Bank of P. for \$1,000, which was honored and transmitted to F. bank for G., as agent of the vendor; that afterwards plaintiff ascertained that M. was not the owner in fee of said land, but the title was vested in M. and his wife, the said premises being then and there the homestead of said M. and his wife, and that G. was not the agent of said M., nor had he ever had authority to make the contract of sale of said premises on

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behalf of the wife of said M.; that thereafter the wife of said M. notified plaintiff, both by word of mouth and letter, that she had never consented to the sale of said premises, the same being her homestead, and that she never would do so, and that she would refuse to sign any deed or contract affecting the same, or for the sale thereof; that plaintiff then notified the defendants that he refused to be longer bound by the agreement and thereby rescinded the same—held to state a cause of action for the recovery of said sum of money.

(Syllabus by the Court.)

Error from District Court, Canadian County;
John J. Carney, Judge.

Action by Martin Schechinger against F. M. Gault and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with instructions.

C. F. Dyer and Geo. S. Pearl, for plaintiff in error.

Wm. O. Woolman, for defendants in error.

WILLIAMS, J. Plaintiff in error, as plaintiff, sued the defendants in error, as defendants, in the district court, declaring on a certain contract entered into with J. D. Miller, by F. M. Gault, agent, which is in words and figures as follows:

“Whereas, the party of the first part has sold and agrees to convey to the party of the second part the following real estate, to wit: N. E. $\frac{1}{4}$, sec. 6, T. 13, R. 10; also the land south of the Rock Island R. R. in the N. W. $\frac{1}{4}$, sec. 5 T. 13, R. 10, for the sum of \$13,500 and payable as follows: \$1,000 cash in hand to be placed in the First National Bank, of Geary, Oklahoma, with the deed and abstract and the same to show a perfect title, the balance of said money to be paid as follows, \$5,000 Jan. 1st, 1909, and the balance \$7,500 on the 1st day of March, 1909. Accept (except) the right of way through the N. E. $\frac{1}{4}$, sec. 6, T. 13, R. 10, now used by the R. R. Co. Party of the second part is to have possession of the land on January 1, 1909, the loose wire now on the fence not stretched is to remain in place, and the party of the second part is to have three ricks of alfalfa hay now on the farm, and the party of the second part is to have the privilege of cutting the alfalfa now growing on the farm; also he has the privilege of plowing the wheat and oats ground.”

In said contract J. D. Miller is designated as party of the first part, and Martin Schechinger as party of the second part.

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Defendants each demur to the petition, on the ground that it does not state facts sufficient to constitute a cause of action. Each of said demurrers was sustained by the trial court, and judgment rendered in favor of the defendants.

As a rule, under the original statute of frauds it is not necessary that an agent should be authorized in writing to sign written contracts for the sale of land, or memorandum of an oral agreement for such sale. 20 Cyc. 277; *Ledbetter v. Walker*, 31 Ala. 175. In many jurisdictions, however, the Legislatures have specifically provided that the agent must be authorized in writing in order to make a binding contract or memorandum. Section 1089, Comp. Laws 1909, par. 5; section 847, St. Okla. 1893; 20 Cyc. 276. It has been held that it is immaterial whether the agent's authority was in writing, if the principal, with full knowledge of the sale and the terms and conditions thereof, ratified the same in writing. *Butman v. Butman*, 213 Ill. 104, 72 N. E. 821. In Michigan it has been held that the authority of an agent to execute a written contract for the purchase of lands may be shown by an oral ratification. *Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490.

Under the allegations of the petition, which are admitted to be true by the demurrer interposed by the defendants in error, the contract for the sale of the land having been executed by the vendor through an agent, who was not authorized thereto in writing, the same was void as in contravention of the statute of frauds; the vendee not having gone into possession of such premises. Section 1089, Comp. Laws 1909; section 847, St. Okla. 1890; *Halsell et al. v. Renfrow et al.*, 14 Okla. 674, 78 Pac. 118. But that fact does not necessarily entitle the vendee to recover the partial payment. If a promisor or vendor is ready and willing to perform and carry out the sale of land in accordance with his oral agreement, he cannot be compelled to give up or pay for the consideration received, on the sole ground that he could not be compelled to perform. *Venable v. Brown*, 31 Ark. 564; *McDonald v. Beall*, 52 Ga. 576; *Day v. Wilson*, 83 Ind. 463, 43 Am. Rep. 76; *Crabtree v. Welles*, 19 Ill. 55; *Brockhausen & Fischer v. Bowles, Jr., et al.*, 50 Ill. App. 98; *Duncan v. Baird*

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& Co., 8 Dana (Ky.) 101; *Nelson v. Forgery*, 27 Ky. (4 J. J. Marsh.) 569; *Dougherty's Administrator v. Goggin*, 1 J. J. Marsh. (Ky.) 374; *Plummer v. Bucknam*, 55 Me. 105; *Riley v. Williams et ux.*, 123 Mass. 506; *Coughlin v. Knowles*, 48 Mass. (7 Metc.) 57, 39 Am. Dec. 759; *Sims v. Hutchins*, 8 Smedes & M. (Miss.) 328, 47 Am. Dec. 90; *Sennett v. Shehan*, 27 Minn. 328, 7 N. W. 266; *La Du-King Mfg. Co. v. La Du*, 36 Minn. 473, 31 N. W. 938; *McClure v. Bradford*, 39 Minn. 118, 38 N. W. 753; *Keystone Iron Co. v. Logan et al.*, 55 Minn. 537, 57 N. W. 156; *Perkins v. Allnutt*, 130 Pac. (Mont.) 1; *Collier v. Coates*, 17 Barb. (N. Y.) 471; *Dowdle v. Camp*, 12 Johns. (N. Y.) 451; *Ketchum & Sweet v. Evertson*, 13 Johns. (N. Y.) 359, 7 Am. Dec. 384; *Abbott v. Draper*, 4 Denio (N. Y.) 51; *Lane v. Shackford*, 5 N. H. 130; *Green v. N. C. R. Co.*, 77 N. C. 95; *Durham Consolidated Land & Improvement Co. v. Guthrie et al.*, 116 N. C. 381, 21 S. E. 952; *Foust v. Shoffner*, 62 N. C. 242; *Mack v. Bragg*, 30 Vt. 571; *Cobb v. Hall*, 29 Vt. 510, 70 Am. Dec. 432. *Nelson v. Shelby Mfg. & Imp. Co.*, 96 Ala. 515, 11 South. 695, 38 Am. St. Rep. 116, *Scott v. Bush*, 26 Mich. 418, 12 Am. Rep. 311, *Brown v. Pollard*, 89 Va. 696, 17 S. E. 6, and *McKinnon v. Vollmar*, 75 Wis. 82, 43 N. W. 800, 6 L. R. A. 121, 17 Am. St. Rep. 178, support a rule to the contrary.

This contract, whilst declared by statute to be invalid, is neither illegal nor against good morals nor against the public policy of the state, other than it was not entered into in the manner prescribed by the statute. Obviously what was intended by declaring that such contract should be invalid unless in writing was that the same should not be enforced. For if it was intended in declaring the contract to be invalid on that ground, that it should be void as against public policy, then all parties thereto would be *in pari delicto*, and though the vendor may have been unwilling to convey or perform, yet the vendee still could not recover his partial payment, for the reason that a court of law would grant neither relief, but would leave them as it found them.

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Plaintiff alleged that G. represented to him that M. was the absolute owner in fee of said premises; that he (G.), as agent of said M., had full and complete authority to make and enter into said contract for the sale of said premises, and that said premises were free and clear of and from all former incumbrances; that plaintiff relied upon the representation so made by G., and, believing them to be true, signed said agreement and in accordance with its terms, drew a draft on the Bank of P. for \$1,000, which said draft was honored, and the money transmitted to the defendant First National Bank; that thereafter plaintiff ascertained that the said M. was not the owner in fee of said land, but that the title was vested in M. and his wife, the said premises then and there being the homestead of the said M. and his said wife, and that said G. was not the agent of said M., nor had he ever had authority or right to contract for the sale of said premises on behalf of the wife of said M.; that thereafter said wife of the said M. notified plaintiff, both by word of mouth and letter, that she had never consented to the sale of said premises, said premises being her homestead, and that she never would do so, and that she would refuse to sign any deed or contract affecting the same or for the sale thereof; that thereafter plaintiff notified defendant G. that he refused to be longer bound by the agreement, and rescinded the same; that after said notice was served he demanded of G. the return of the said \$1,000, which was refused. By the demurrer these allegations were admitted to be true.

In *Harris et al. v. Carter's Adm'rs et al.*, 3 Stew. (Ala.) 233, it is said:

"It is certainly a correct rule that one who has purchased an estate under the influence of the fraudulent representations of the seller may rescind the contract and recover back the purchase money if paid, or avoid its payment if unpaid; but a purchaser, with knowledge of his vendor's title, cannot object that he had no title at the time of the sale if he afterwards consummate his title before the vendee has performed the conditions on which he is authorized to demand it."

But it seems to be settled by authority and reason that if the contract is made by the vendor in good faith, and he has such

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an interest in the subject-matter of the contract, or is so situated, that he can reasonably convey a good title at the proper time, that is sufficient. *Gray v. Smith* (C. C.) 76 Fed. 525; *Burks v. Davies*, 85 Cal. 110, 24 Pac. 613, 20 Am. St. Rep. 213; *Easton v. Montgomery et al.*, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123; *Provident Loan & Trust Co. v. McIntosh et al.*, 68 Kan. 452, 75 Pac. 498, 1 Ann. Cas. 906; *Dresel v. Jordan*, 104 Mass. 415; *Boehm v. Wood*, 1 Jac. & Walk. 419; *Salisbury v. Hatcher*, 2 Y. & Col. Ch. 54; *Dutch Church v. Mott*, 7 Paige (N. Y.) 77; *Baldwin v. Salter*, 8 Paige (N. Y.) 473; *Scymour v. Delaney*, 3 Cow. (N. Y.) 445, 15 Am. Dec. 270; *Hepburn v. Dunlop*, 1 Wheat. 179, 4 L. Ed. 65; *Richmond v. Gray*, 3 Allen (Mass.) 25, and cases cited; *Barnard v. Lee*, 97 Mass. 92; *Hazelton v. Le Duc*, 10 App. D. C. 395; *Flanagan v. Fox*, 5 Misc. Rep. 589, 25 N. Y. Supp. 514; 29 Am. & Eng. Encyc. of Law (2d Ed.) 608.

It follows that the trial court committed error in sustaining the demurrer and holding that the petition did not state a cause of action.

The judgment of the lower court is reversed and remanded, with instructions to proceed in accordance with this opinion.

All the Justices concur.

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No. 2399. Opinion Filed February 11, 1913.

(130 Pac. 159.)

PARTIES — Execution — Substitution — Injunction. Where, in a suit to restrain the execution of a judgment against him, on the ground that the land levied upon constituted the homestead of plaintiff and his family, and at the time the instrument merged in the judgment was executed the title thereto was in the United States, but that the same had subsequently been proven up, and where the court permitted an amendment by striking out the name of plaintiff and substituting therefor the name of his wife, held, that as such amendment did not change the claim, in view of Wilson's Rev. & Ann. St. 1903, sec. 4343, no error. Held, further, that the remedy by motion to quash was cumula-

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tive, and did not oust a court of equity of its jurisdiction to restrain the execution of the judgment on the ground that it exerted no lien upon the land.

(Syllabus by the Court.)

Error from District Court, Kay County;

W. M. Bowles, Judge.

Action by Tomo Gvozdanovic against R. E. Rader, Sheriff, and others. Mary Gvozdanovic, the wife of plaintiff, was thereafter substituted in his place. Judgment for plaintiff, and defendants bring error. Affirmed.

W. S. Cline, for plaintiffs in error.

W. K. Moore, for defendant in error.

TURNER, J. On May 4, 1909, Tomo Gvozdanovic filed in the district court of Kay county his petition, and prayed for and obtained a temporary restraining order enjoining R. E. Rader, as sheriff of that county, from selling, under execution, a certain piece of land to satisfy a certain judgment, declared a lien thereon, which Stark Bros. had theretofore recovered against him in said court. After motion to dissolve, which seems not to have been passed on, defendants, who are plaintiffs in error, answered and justified under the writ, and for a second defense pleaded that the matter was *res adjudicata*, in that petitioner theretofore, in that case, had moved to quash said execution, on the ground, among others, that the same was his homestead, and the same had been overruled. On September 7, 1909, came petitioner and moved the court to substitute for him, as plaintiff, his wife, Mary, which was done; whereupon she filed an amended and verified petition, alleging, in substance, that the judgment sought to be enforced by the process complained of was not a lien upon the land, for the reason: "That the judgment which the said order of sale was issued to satisfy was rendered on the 1st day of December, 1905, on a written instrument signed by Tomo Gvozdanovic on the 31st day of August, 1894, which said instrument purported to give a lien on the aforesaid land, above described. That at the time that the said Tomo Gvozdanovic signed the said instrument on the 31st day

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of August, 1894, he was the head of a family and a married man"—and with his children was living on the land with this plaintiff, his wife.—

"That the said land was at that time, and is now, the homestead of the said Tomo Gvozdanovic and this plaintiff. That it was government land belonging to the United States at the time the instrument sued upon in this action was signed, and was not proved up and patent issued until the year 1903. That this plaintiff did not sign the said instrument which, it is alleged, became a lien upon the said land, and which the court attempted to foreclose in its judgment of December 1, 1905. That the said instrument so signed by Tomo Gvozdanovic was, on account of this plaintiff not signing the same with her husband, Tomo Gvozdanovic, absolutely null and void and of no effect, so far as creating a lien upon the land herein described, which was, and is now, the homestead of the plaintiff and Tomo Gvozdanovic. That no judgment has ever been rendered against this plaintiff, and no service of process has ever been served on her in an action against her, wherein it was sought to foreclose any lien upon the homestead in question. That she has never signed any instrument which gave, or purported to give, to Stark Bros. any lien upon her homestead. That a sale of the above-described property would result in great and irreparable damages to the plaintiff, and that she has no other speedy, adequate, or proper remedy at law"

—and prayed that the injunction be made perpetual.

After answer to said amended petition, in effect the same as to the petition of Tomo, there was trial to the court, which resulted as prayed, and defendants bring the case here. It is not assigned that the court erred in holding that the judgment exerted no lien upon this homestead. Defendants assign only that the court erred in sustaining the motion of Tomo and substituting his wife as party plaintiff; and that the judgment theretofore rendered, overruling his motion to quash this execution, was final and a bar to any further proceedings to execute the order of sale issued in said cause. They contend that plaintiff had an adequate remedy at law. As the amendment did not change the claim, the substitution made was proper. *Wilson's Rev. & Ann. St. 1903, sec. 4343.*

In *Hanlin v. Baxter*, 20 Kan. 134, Baxter sued Hanlin, before a justice of the peace, in damages, alleged to have been done

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by his cattle on certain land, the owner of which was not alleged. After Hanlin appeared and a jury had been accepted, Baxter obtained leave, over objection and exception, to substitute William O. for himself (John B. Baxter) as plaintiff in the amended bill of particulars. After judgment for William O. against Hanlin, the latter removed the cause by proceedings in error to the district court, which affirmed the proceedings and judgment of the justice. Further, on proceedings in error to the Supreme Court, Brewer, J., said:

"Can a justice, under any circumstances, permit such an amendment? It may be remarked that, as no change was made in the allegation of the date of the trespass, or the premises upon which the trespass was committed, the cause of action was apparently the same; and the only change was that a different party was presented as entitled to recover for the damages done. It may be conceded that the circumstances are rare which will justify such an amendment; but that the power to make it exists must, we think, also be conceded. The authorities seem to warrant this"

—and, after citing numerous authorities, affirmed the judgment.

There is no merit in the contention that the question adjudged by the action of the court in overruling Tomo's motion to quash this execution against him is *res adjudicata* as to him, much less as to her. That remedy being merely cumulative and available by either or both, it follows that to protect her homestead, Mary had a right to resort to this remedy, the object of which is to restrain its sale under an execution on a judgment neither of which exerted a lien upon the land. *Love, Sheriff, et al. v. Cavett*, 26 Okla. 179, 109 Pac. 553.

The judgment is affirmed.

All the Justices concur.

Conelly Const. Co. v. Royce.

CONELLY CONST. CO. v. ROYCE.

No. 2411. Opinion Filed February 11, 1913.

(130 Pac. 146.)

FRAUDS, STATUTE OF—Sale of Chattels—Delivery. A delivery and acceptance, at any subsequent time, of any part of the goods or chattels which are the subject of an oral agreement and within the statute of frauds takes the contract out of the statute of frauds and makes valid the entire contract.

(Syllabus by the Court.)

Error from District Court, Beckham County;
G. A. Brown, Judge.

Action by Lloyd Royce against the Conelly Construction Company. Judgment for plaintiff, and defendant brings error. Affirmed.

R. B. Forrest, for plaintiff in error.

W. B. Merrill, for defendant in error.

TURNER, J. On August 20, 1909, defendant in error, Lloyd Royce, sued the Conelly Construction Company, plaintiff in error, in the district court of Beckham county, in damages for the breach of a parol contract to deliver 2,000 cubic feet of sand at \$1.25 per cubic yard, alleging part performance and acceptance by defendant for which, he says, defendant is justly indebted to him for the sand accepted, \$41.25. After answer in effect a general denial, there was trial to a jury and judgment for plaintiff for \$341.75, and defendant brings the case here.

There is no merit in the contention that this contract is within the statute of frauds (section 1089, Comp. Laws 1909), which reads:

"The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent: * * * An agreement for the sale of goods, chattels, or things in action, at a price not less than fifty dollars, unless the buyer accept or receive part

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of such goods and chattels, or the evidences or some of them, of such things in action, or pay at the same time some part of the purchase money. * * *

This for the reason that the petition alleges and the proof shows sufficient part performance, by the subsequent delivery and acceptance of part of the sand, to take it out of the statute.

In *Gabriel v. Kildare El. Co.*, 18 Okla. 318, 90 Pac. 10, 10 L. R. A. (N. S.) 638, 11 Ann. Cas. 517, the court, construing this statute, in the syllabus, said:

"A delivery and acceptance, at any subsequent time, of any part of the goods or chattels which are the subject of an oral agreement and within the statute of frauds takes the contract out of the statute of frauds and makes valid the entire contract."

Tinklepaugh-Kimmel Hdw. Co. v. Minneapolis, etc., Co., 20 Okla. 187, 95 Pac. 427; *Logan v. Brown*, 20 Okla. 334, 95 Pac. 441, 20 L. R. A. (N. S.) 298; *Grant et al. v. Milam*, 20 Okla. 672, 95 Pac. 424.

There is no merit in the remaining contentions.

Affirmed.

All the Justices concur.

 BERRY et al. v. SUMMERS.

No. 2413. Opinion Filed February 11, 1913.

(130 Pac. 152.)

INDIANS — Deeds — Validity — Removal of Restrictions. A full-blood member of the Creek tribe of Indians, prior to the removal of his restrictions, joined with his wife in the execution and delivery of a deed to a portion of his allotment. After the removal of his restrictions he executed and delivered a deed to the same land to his wife. Held, the first deed being void, the subsequently acquired title of the wife did not inure to the benefit of her grantee. (Syllabus by the Court.)

Error from District Court, Creek County;
W. L. Barnum, Judge.

Action by J. B. Summers against I. K. Berry and Mrs. L. H. McClung. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

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Biddison & Campbell and *W. P. Root*, for plaintiffs in error.

J. E. Thrift, for defendant in error.

DUNN, J. This case presents error from the district court of Creek county. The only question involved under the agreed statement of facts on which the same was tried is whether Hannah Frank is bound by her covenant of warranty in the deed executed and delivered by Noah Frank, her husband, and herself to L. B. Jackson, and by him made to plaintiff, J. B. Summers. The deed in question was to a portion of Noah Frank's tribal allotment of land. It was executed July 26, 1905, prior to the removal of restrictions on his right to alienate. After the removal of his restrictions he executed and delivered a deed to the said land to his wife, Hannah Frank, and the question involved in this case is whether the title which she then secured inured to the grantee under the first deed. The transactions covered by the agreed statement of facts occurred before statehood and while the laws of Arkansas as put in force in the Indian Territory by acts of Congress were operative. Counsel for plaintiff has not favored us with a brief, and we are not advised upon what theory the court rendered judgment in his favor, for the uniform holding of all of the authorities we have been able to discover on this proposition is that, in order for a deed to operate as an estoppel, it is essential that it should be valid as a transfer of grantor's interest. 3 Devlin on Deeds, secs. 1275, 1281a; *Altemus, etc., v. Nickell*, 115 Ky. 506, 74 S. W. 221, 103 Am. St. Rep. 333; *Pells et al. v. Webquish*, 129 Mass. 469; *Bledsoe v. Wortman et al.*, ante, 129 Pac. 841. Under the provisions of section 16 of the Supplemental Agreement of the Creek Tribe of Indians (32 St. at L. 503, c. 1323), the grantor, Noah Frank, could make no valid conveyance of his allotment. The deed which he made was absolutely void and in no wise prevented him after the removal of his restrictions from making another one. It divested him of no right or title in the land, and was invalid to transfer any of grantor's interest.

The case of *Pells et al. v. Webquish*, *supra*, from the Supreme Judicial Court of Massachusetts, was one where Mercy

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McGrego, an Indian, executed to Jesse Webquish, in contravention of the law relating to the tribe of Indians of which she was a member, a deed to a tract of land. The court dealing with the case, after holding that she was incapable of making such a contract and that its execution could not affect her interest in the estate or the interest of her descendants, said:

"The deed being absolutely void, and the title remaining in Mercy McGregor, neither she nor her descendants were estopped from setting up title in the land, as against Jesse Webquish, although he afterwards became a proprietor; for the doctrine of estoppel has no application to the case of a party incapable by law of making a contract."

The case of *Altemus, etc., v. Nickell, supra*, was one wherein, under the statutes of Kentucky, conveyances of land held in adverse possession were denounced as null and void, and the court held where such a conveyance was attempted to be made under a warranty deed, the grantee took no title, nor did the after-acquired title of the grantor inure to the benefit of the grantee; the court in its discussion saying:

"The basis of the doctrine that after-acquired title attaches for the benefit of the vendee of one who has conveyed with warranty, but without title, is the warranty. In very ancient times, before the system of passing title by bargain and sale came into use, it was upon the implied warranty. But running through the treatises on the subject, it will be observed that a warranty must have existed in fact, or be supplied as a fiction, to support the reasoning by which the passing of title by estoppel was maintained. It must have been such warranty as runs with the land, and must have been attached to, and have been a part of, the deed of conveyance. Bigelow, Estoppel, 386 *et seq.* If then, the deed containing the warranty is void, every part of it must be ineffectual. To allow that the parties to a transaction prohibited as vicious might do by indirection and circumlocution that which they could not do directly, would be to bring a reproach upon the administration of the law."

The case from this court, *Bledsoe v. Wortman et al., supra*, which dealt with section 642, c. 27, Mansfield's Digest of Arkansas, which provides that if a grantor conveys real estate without title, but afterwards acquires the same, the estate then acquired shall immediately pass to the grantee, is in point. The grantor

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in the case was a member of the Cherokee Nation, and the same principle was involved in the decision as is involved in the case at bar. This court in that case said:

“Said land prior to the time of its being selected by Fulsom as a part of his allotment being a part of the public domain of the Cherokee Nation, though he was a member of said tribe, he could not execute any lawful conveyance thereto, as such conveyance was void (1) on the ground that restrictions had not been removed as to such land, and (2) further because it was against public policy for him to execute a conveyance to a part of the public domain of said nation. The rule of estoppel as declared by said section 642 has no application to conveyances executed in the face of the law. Such conveyance being void when executed, said section 642 was not intended to breathe life into it.”

The judgment of the trial court is therefore reversed, and the cause remanded, with instructions to set the same aside and enter one in accordance with this opinion.

HAYES, C. J., and KANE and TURNER, JJ., concur; WILLIAMS, J., concurs in the conclusion.

MOORE v. COUGHLIN.

No. 2392. Opinion Filed February 11, 1913.

Error from District Court, Kay County;

C. L. Pinkham, Judge.

Action by Joe Coughlin against Reuben L. Moore. Judgment for plaintiff, and defendant brings error. Affirmed.

H. B. Martin, Chas. E. Bush, John T. Murry, Jr., and P. W. Cress, for plaintiff in error.

J. F. King, for defendant in error.

PER CURIAM. The issues involved in this case are, so far as its merits are concerned, identical with those involved in the case of *Moore v. Coughlin* (not yet officially reported), 128 Pac. 257. The judgment of the trial court in that case was

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affirmed, and as the case at bar was submitted on the same evidence as was introduced in that case, the same judgment will follow.

The judgment of the trial court is accordingly affirmed.

BILLY v. UNKNOWN HEIRS OF GRAY, *Deceased, et al.*

No. 2318. Opinion Filed May 14, 1912.

Rehearing Denied February 11, 1913.

(130 Pac. 533.)

APPEAL AND ERROR—Necessary Parties—Dismissal. Where an action was brought by a person claiming to be the sole owner of a tract of land against several defendants to quiet title and to remove cloud therefrom, and a third person intervened, claiming also to be the sole owner of said land and praying for judgment quieting his title, and the judgment rendered decrees plaintiff to be the owner of the title to an undivided half interest in said land and quiets same as against the claims and demands of the defendants named in plaintiff's petition, and decrees the interpleader to be the owner of the title to the other undivided half interest in said land and quiets his title as against the claims and demands of defendants, in the prosecution of an appeal from said judgment by plaintiff, the defendants are necessary parties thereto.

(Syllabus by the Court.)

Error from District Court, Coal County;

A. T. West, Judge.

Action by Lita Billy against the Unknown Heirs of D. T. Gray, deceased, and others; Benjamin Finley intervener. Judgment for plaintiff and intervener, and plaintiff brings error. Dismissed.

George A. Trice and H. E. Cullom, for plaintiff in error.

C. M. Threadgill and Fooshee & Brunson, for defendant in error, Benjamin Finley.

HAYES, J. This action was originally instituted in the district court of Coal county by plaintiff in error, hereinafter called plaintiff, against the unknown heirs of D. T. Gray, de-

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ceased, and W. B. Chism and the Mortgage & Debenture Company, a corporation. Plaintiff alleges in her petition that she is the legal owner in fee simple of the lands described in her petition, and that said lands were patented to one Albert Billy, as his pro rata portion of the lands of the Chickasaw and Choctaw Nations; that the said Albert Billy died intestate, seized of said real estate before statehood, and left plaintiff as his only surviving heir at law. She alleges that defendants claim title and interest in and to said real estate adverse to her rights; that the unknown heirs of D. T. Gray claim title under and by virtue of two deeds, conveying said lands to D. T. Gray; that one of said deeds was executed by Benjamin Finley and the other by one Felin Bean, both of which have been duly recorded. She alleges that defendant Chism holds a pretended deed to said lands, executed by one R. N. Cummings and wife; and that defendant Mortgage & Debenture Company holds a pretended mortgage, purported to have been executed by R. N. Cummings and wife, all of which instruments have been recorded. She alleges the same are wholly void and without effect, and that they constitute a cloud upon her title, and she prays for a cancellation of said instruments, and that the cloud upon her title be removed. All of the defendants were summoned as required by law.

Thereafter, Benjamin Finley, after obtaining leave of court to intervene and be made a party defendant, filed an answer and cross-petition by which he alleges that he is the sole surviving heir of the said Albert Billy, the allottee of the lands in controversy, and alleges that the deed executed by him to D. T. Gray was executed during his minority, and was procured by fraud. He thereupon prays that he have judgment for said lands, and that the conveyances mentioned in plaintiff's petition be canceled as a cloud upon his title. The defendants named in plaintiff's petition failed to answer and made default.

Issues having been joined upon plaintiff's petition and the interplea of Benjamin Finley, now defendant in error, the cause was tried to a jury. The verdict of the jury found facts upon which the court determined that both plaintiff and defendant in error are heirs of the deceased allottee; and that they each in-

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herited from said allottee an undivided half interest in the lands in controversy, and the court rendered judgment in favor of plaintiff for an undivided half interest in the lands and quieting her title therein as against the defendants named in her petition, and defendant in error; and by the same judgment decreed that defendant in error is the owner of an undivided half interest in said land, and quieted his title as against defendant and plaintiff. From that judgment plaintiff alone prosecutes this proceeding in error against Benjamin Finley alone as defendant in error. Defendant in error has moved that the cause be dismissed, because defendants in the trial court have not been made parties to this proceeding. The time allowed by statute within which to perfect an appeal from the judgment of the trial court has already elapsed. Every necessary party to an appeal must either make general appearance within the time allowed for appealing from the judgment or final order of a court, or summons must issue within such time and service thereof be had upon the necessary parties, or the appeal will be dismissed. *Strange et al. v. Crismon*, 22 Okla. 841, 98 Pac. 937. All parties to an action whose interests will be affected by a reversal of the judgment appealed from are necessary parties to an appeal. *Vaught v. Miners' Bank of Joplin*, 27 Okla. 101, 111 Pac. 214; *Trugeon et al. v. Gallamore*, 28 Okla. 73, 117 Pac. 797; *Siebert v. First Nat. Bank of Okeene*, 25 Okla. 778, 108 Pac. 628.

It is contended by plaintiff in error that the omitted defendants are not necessary parties to the appeal; but with this contention we cannot concur. The judgment which plaintiff seeks to set aside by this proceeding decrees to her, as against defendants, an undivided half interest in the lands in controversy, and quiets her title in said undivided half interest against all the claims and demands of the omitted defendants. It likewise decrees the title and possession to an undivided half interest in defendant in error, and quiets his title thereto against all the claims and demands of the omitted defendants. What plaintiff sought in the court below, and what she seeks now, is a judgment decreeing to her the title to said lands as the sole owner, and quieting the same against all the claims and demands of de-

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defendants, and a cancellation of the instruments described in her petition as constituting a cloud upon her title in and to the entire tract of land in controversy. This she hopes to accomplish, either by having the judgment in which the omitted defendants are parties set aside by this court and a new trial granted, or by a rendition in this court of a judgment in her favor upon the record. In either event she seeks to set aside a judgment to which persons not before this court are parties, and a different judgment rendered. If she should accomplish her purpose, and a new trial be granted, the absent persons then, upon a proper showing, might be permitted by the lower court to appear and defend the action against them. At any event, such judgment could not be rendered in this court, or a new judgment rendered in the trial court, without affecting the interests of the absent defendants, and this court is, therefore, without authority to proceed in this cause.

It is urged, upon the authority of *Hallwood v. Dailey*, 70 Kan. 620, 79 Pac. 158, and *Zinkeisen v. Lewis et ux.*, 71 Kan. 837, 80 Pac. 44, 83 Pac. 28, that because defendants defaulted in the court below they are not necessary parties on appeal; but, as heretofore observed by this court, the decisions in the foregoing cases were controlled by a statute adopted in Kansas in 1901, which constitutes no part of the statute adopted from that state into the territory of Oklahoma, and later into this state, and the fact alone that a person has made default in the lower court does not render him an unnecessary party on appeal from a judgment to which he is a party, if by reversal of such judgment his interests will be affected. *Jones v. Balsley & Rogers et al.*, 25 Okla. 344, 106 Pac. 830; *Merrill v. Walters*, 30 Okla. 173, 119 Pac. 1122.

It follows that this proceeding in error must be dismissed, and it is so ordered.

TURNER, C. J., and KANE and DUNN, JJ., concur; WILLIAMS, J., not participating.

St. Louis Carbonating & Mfg. Co. v. Lookeba State Bank.

ST. LOUIS CARBONATING & MFG. CO. v. LOOKEBA
STATE BANK.

No. 2400. Opinion Filed February 11, 1913.

(130 Pac. 280.)

1. **BANKS AND BANKING—Collections—Duties of Bank.** It is the duty of a bank, which receives commercial paper for collection or other service in connection therewith, to do all reasonable acts necessary to secure its payment and secure the liability thereon of the parties thereto, and if it fails in this duty, and thereby causes loss to its principal, it becomes liable for such loss.
2. **SALES—Transfer of Title—Bill of Lading.** Where a merchant draws a draft for a part of the purchase price of goods consigned to a customer with notes and mortgage to be executed by him for the balance, and transmits the same, with bill of lading attached, to a bank with instructions to collect the draft and have notes and mortgage executed before delivering the bill of lading, this will be held sufficient evidence of consignor's intention to reserve the title and right of possession until the draft is paid and the papers executed.
3. **BANKS AND BANKING—Collections—Negligence—Measure of Damages.** The measure of damages which a principal is entitled to recover of a collecting bank which has been negligent is the actual loss which he has suffered, which *prima facie* is the amount of the claim which has been placed with said bank for collection, if there is a reasonable probability that the entire debt would have been collected except for the bank's negligence, and the burden is on the defendant to reduce it.

(Syllabus by the Court.)

*Error from Caddo County Court;**B. F. Holding, Judge.*

Action by the St. Louis Carbonating & Manufacturing Company against the Lookeba State Bank. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with instructions.

Pruett & Livesay and *Gardner & Pickett*, for plaintiff in error.

McKnight & Heskett, for defendant in error.

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DUNN, J. This case presents error from the county court of Caddo county. On February 18, 1910, plaintiff in error, as plaintiff, filed its petition in the said court against the defendant, in which it was alleged that it was a corporation organized under the laws of the state of Missouri and located in the city of St. Louis in said state; that on the 17th day of March, 1909, plaintiff forwarded by mail to the defendant a certain bill of lading from the plaintiff as consignor to Wade & Hadley, of Lookeba, Okla., as consignee, said bill of lading calling for a soda fountain and supplies, a sight draft on said Wade & Hadley and in favor of plaintiff, in the sum of \$50, and twenty notes for \$10 each made payable to plaintiff to be signed by said Wade & Hadley as makers, and also one chattel mortgage upon the merchandise so consigned. Accompanying the notes, chattel mortgage, and bill of lading, was a letter to the said Lookeba State Bank, as follows:

"We are sending you herewith sight draft for \$50.00, twenty notes for \$10.00 each, and chattel mortgage securing the payment of notes. We will ask you to have these notes and mortgage signed by Wade & Hadley of your town. We will also ask you to collect the inclosed draft for \$50.00 from them, and after same has been done we will ask you to surrender bill of lading, which is also inclosed herewith. We will then ask you to kindly have the mortgage properly recorded and return same to us with all notes and proceeds of sight draft, less your fee for your services in the matter."

Plaintiff alleges that the instructions given the said bank in the foregoing letter were not followed, but that, contrary thereto, defendant did not collect said sight draft from the said Wade & Hadley and did not have the said Wade & Hadley execute and deliver the notes and mortgage, and delivered said bill of lading to Wade & Hadley without first collecting the said \$50 and without securing the proper execution of the notes and mortgage; that, upon the delivery of the said bill of lading to Wade & Hadley by the defendant, the said Wade & Hadley secured the soda fountain and supplies and appropriated the same to their own use and benefit. Plaintiff alleges that, by reason of said negligent and wrongful delivery of the said bill of lading, it had

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been damaged in the sum of \$250, for which sum it prays judgment with interest from April 1, 1909, and for costs.

Defendant answered by general denial, and the cause came on for trial before the court without a jury. Plaintiff established the averments of its petition by the deposition of its president, to which defendant filed a demurrer, which was by the court sustained, and the cause has been lodged in this court for review.

The question presented is whether the bank, acting in the capacity of agent for the plaintiff, having violated the instructions set out in the above letter, is liable, and, if so, in what amount. We think the rule as to the liability of the bank is well stated in Clark & Skyles on the Law of Agency, sec. 402d, as follows:

"It is the duty of an agent who receives negotiable paper for collection to do all acts necessary to secure and preserve the liability thereon of all the parties prior to his principal; and if he fails in this duty, and thereby causes loss to his principal, he becomes liable for such loss."

See, also, 2 Bolles on Modern Law of Banking, p. 572 *et seq.*; *Bank of Big Cabin v. English*, 27 Okla. 334, 111 Pac. 386; *Chapman v. McCrea et al.*, 63 Ind. 360; *Palmer v. Holland*, 51 N. Y. 416, 10 Am. Rep. 616; *Hoard v. Garner*, 5 N. Y. Super. Ct. 179; *Bank of Washington v. Triplett et al.*, 1 Pet. 25, 7 L. Ed. 37; *Tyson v. State Bank of Indiana*, 6 Blackf. (Ind.) 225, 38 Am. Dec. 139; *Mound City Paint & Color Co. v. Commercial Nat. Bank*, 4 Utah, 353, 9 Pac. 709; *National Revere Bank v. Nat. Bank of Republic*, 172 N. Y. 102, 64 N. E. 799.

Defendant argues that it is not made liable for the amount of the \$50 draft by delivery of the bill of lading, for the reason that defendant had no right to retain the bill of lading from Wade & Hadley in accordance with plaintiff's instructions because the goods shipped were in effect delivered to Wade & Hadley on being consigned to them. On this identical proposition the Supreme Court of South Carolina, in the case of *Greenwood Grocery Co. v. Canadian County Mill & Elevator Co.*, 72 S. C. 450, 52 S. E. 191, 2 L. R. A. (N. S.) 79, 110 Am. St. Rep. 627, 5 Ann. Cas. 261, said:

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"The sole question, therefore, is whether by drawing on the plaintiff with the bill of lading attached to the draft, and refusing to deliver the bill of lading without payment of the draft, the defendant retained title and right of possession of the property. The effect of a bill of lading issued by the carrier, who is a third party, on the title to the property as between the consignor and consignee, is a question of fact depending not only on the terms of the paper itself, but on the intention of the parties as expressed by their dealings with each other. 1 Benj. on Sales, secs. 568, 579, 580; *Emery v. Irving Nat. Bank*, 25 Ohio St. 360, 18 Am. Rep. 299; 24 Am. & Eng. Ency. of Law (2d Ed.) 1066; *Hobart v. Littlefield*, 13 R. I. 341; *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291; *Kentucky Refining Co. v. Globe Refining Co.*, 104 Ky. 559, 47 S. W. 602 [42 L. R. A. 353, 84 Am. St. Rep. 468]; *Chandler v. Sprague*, 38 Am. Dec. 418 note; 23 Eng. Rul. Cas. 383, note. * * * As between the vendor and purchaser the authorities leave no room for doubt, however, that even if the bill of lading provides for delivery to the consignee, yet, if the consignor draws for the price attaching the bill of lading to the draft, this is sufficient evidence of his intention to reserve the title and right of possession until the draft is paid, and the consignee is not entitled to the goods until payment. *Emery v. Irving Nat. Bank*, 25 Ohio St. 360, 18 Am. Rep. 299; *Chandler v. Sprague*, 38 Am. Dec. 419, note; *Rochester Bank v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290; *Cayuga County Nat. Bank v. Daniels*, 47 N. Y. 631; *Marine Bank v. Wright*, 48 N. Y. 1; *Halsey v. Warden*, 25 Kan. 128; *Green Bay First Nat. Bank v. Dearborn*, 115 Mass. 219, 15 Am. Rep. 92."

See, also, *St. Louis & S. F. R. Co. v. Allen*, 31 Okla. 248, 120 Pac. 1090, 39 L. R. A. (N. S.) 309.

The defendant therefore being liable, the next consideration is the measure of damages in which it is responsible to plaintiff. From an investigation of the authorities we find that the circumstances of each particular case as a rule govern the measure of damages in cases of negligence in the collection of drafts or the matter of taking proper steps to preserve liability thereon. The damages which a principal is entitled to recover of a collecting agent who has been negligent are generally stated to be the actual loss which he has suffered, which is *prima facie* the amount of the claim which has been placed in his hands for collection, if there is a reasonable probability that the entire debt

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would have been collected but for the agent's negligence. 1 Clark & Skyles, Law of Agency, sec. 402g; 2 Bolles on the Modern Law of Banking, pp. 572, 573; 3 Sedgwick on Damages, sec. 819; *Allen v. Suydam*, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555. And, as was said by the Supreme Court of Nebraska, in the case of *Dern et al. v. Kellogg et al.*, 54 Neb. 560, 565, 74 N. W. 844, 846:

"It is only necessary to show a reasonable probability that with due care the collection would have resulted. The burden then rests on the defendant to show that there was no damage."

Under the circumstances of this case, the burden is upon the defendant to show that there was no damage, or that the damage was less than the full amount of the note or that the damage was only nominal. Clark & Skyles on the Law of Agency, sec. 402g; Bolles on Banking, pp. 572, 573; *Dern et al. v. Kellogg et al.*, *supra*; *Allen v. Suydam*, *supra*.

The judgment of the trial court in sustaining the demurrer to the evidence is, accordingly, reversed, and the cause remanded, with instructions to grant a new trial.

All the Justices concur.

PHILLIPS *et al.* v. KOOGLER.

No. 4507. Opinion Filed February 11, 1913.

(130 Pac. 137.)

APPEAL AND ERROR—Case-Made—Settlement—Dismissal. A proceeding in error, brought to this court on a case-made, where it does not appear from the record or otherwise that the defendant in error was present either personally or by counsel at the settlement, or that notice of the time thereof was served or waived, or what amendments suggested, if any, were allowed or disallowed, will be dismissed on motion of defendant in error.

(Syllabus by the Court.)

Error from District Court, Atoka County;
Robert M. Rainey, Judge.

Schollmeyer v. Van Buskirk.

Action between Jesse W. Phillips and others and D. C. Koogler. From the judgment, Phillips and others bring error. Dismissed.

J. W. Jones, I. L. Cook, and W. S. Farmer, for plaintiffs in error.

J. G. Ralls, for defendant in error.

DUNN, J. This case comes to this court on appeal from a judgment of the district court of Atoka county. The sufficiency of the case-made to support the petition in error filed is challenged by a motion, which must be sustained for the reason that it does not appear from the record or otherwise that the defendant in error was present either personally or by counsel at the settlement, or that notice of the time thereof was served or waived, or what amendments suggested, if any, were allowed or disallowed.

No answer is made to the motion; and, the record before us sustaining the same, the proceeding is dismissed. See *First Nat. Bank of Collinsville v. Daniels*, 26 Okla. 383, 108 Pac. 748, and cases therein cited.

HAYES, C. J., and KANE and TURNER, JJ., concur; WILLIAMS, J., absent, and not participating.

SCHOLLMEYER v. VAN BUSKIRK.

No. 4706. Opinion Filed February 11, 1913.

(130 Pac. 138.)

1. **APPEAL AND ERROR—Review by Transcript—Time of Taking—Writ.** When a judgment of the lower court is sought to be reviewed by transcript, the proceeding in error must be commenced in this court within six months from the date of its rendition.
2. **SAME—Record—Motion for New Trial.** A motion for a new trial is not a part of the record brought up by a transcript.

(Syllabus by the Court.)

Error from Oklahoma County Court;
John W. Hayson, Judge.

Adams v. Board of Com'rs of Garfield County et al.

Action between J. H. Schollmeyer and Jacob Van Buskirk. From the judgment, Schollmeyer brings error. Dismissed.

John Shirk and *H. L. Danner*, for plaintiff in error.

Grant Stanley, for defendant in error.

WILLIAMS, J. This proceeding in error seeks to review, by means of a transcript, a judgment rendered in the trial court on May 24, 1912.

A proceeding in error, commenced in this court after the expiration of six months from the rendering of said judgment or the overruling of a motion for a new trial, must be dismissed.

The action of the lower court in overruling a motion for a new trial is not brought to this court by means of a transcript. *Richardson et vir v. Beidleman et al.*, 33 Okla. 463, 126 Pac. 816, 818.

The proceeding in error must be dismissed.

All the Justices concur.

ADAMS v. BOARD OF COM'RS OF GARFIELD
COUNTY *et al.*

No. 4499. Opinion Filed February 11, 1913.

(130 Pac. 148.)

1. **COUNTIES—Levy of Taxes—Validity—Injunction.** The excise board of a county, without a petition as provided for by statute, made a levy to be used for the purpose of eradicating cattle ticks therein. The said county was located partly above and partly below the quarantine line established by the State Board of Agriculture. Plaintiff, a taxpayer, brought action to enjoin said board from allowing claims and the county treasurer from paying warrants drawn on such fund, on the ground that under section 2, c. 115, p. 255, Sess. Laws 1910-11, a levy on all taxable property in the county is subject to taxation for this purpose only when petitioned for by a majority of the voters thereof or of any municipal township, and the court refused to grant the injunction. Held, error; that the levy was without authority of law and was void.
2. **STATUTES—Construction—Levy of Tax.** Where a statute imposing a tax is susceptible of two constructions, and the legisla-

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tive intent is in doubt, the doubt should, as a rule, be resolved in favor of the taxpayer.

(Syllabus by the Court.)

Error from District Court, Garvin County;
R. McMillan, Judge.

Action by E. Z. Adams against the Board of County Commissioners of Garvin County and another. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions.

John M. Stanley and Andrew Wood, for plaintiff in error.

Charles West, Atty. Gen., and Charles L. Moore, Asst. Atty. Gen., for defendants in error.

DUNN, J. On October 8, 1912, plaintiff in error, as plaintiff, filed his petition for an injunction against the defendants in error in the district court of Garvin county, in which he alleges, in substance, that he is a legal resident and taxpayer of said county; that on June 4, 1912, the board of county commissioners of said county passed a resolution attempting to appropriate \$2,500 to be used to effect the eradication of cattle ticks in said county; that on August 16, 1912, the excise board of said county levied \$8,250, as taxes for the contingent fund for the fiscal year of 1912-13, which levy included the said \$2,500, to be used for tick eradication in the said county; that, in the pursuance of said action of the board, claims have been allowed and warrants issued against the said fund in the sum aggregating \$742.15; that other claims for labor and materials, etc., have been presented for allowance against the same and await the action of the board thereon; that Garvin county is located partly above and partly below the live stock quarantine line established and maintained by the Oklahoma State Board of Agriculture; that the said board of county commissioners acted without authority of law in making an appropriation of funds for tick eradication; that the said excise board acted without authority of law in making the levy of taxes for the reason that the said levy had not been petitioned for by a majority of the taxpayers of Garvin county nor of any township therein as provided by section 2,

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c. 115, of Sess. Laws 1911; that the paying out of moneys for the purposes mentioned is without authority of law and will result in irreparable injury to plaintiff and every other taxpayer in Garvin county; and that plaintiff is without an adequate remedy at law. Plaintiff prays that the board of county commissioners be enjoined and restrained from allowing any claims and that said defendant J. F. Trimmer, county treasurer, be enjoined and restrained from paying any of the warrants which have been or may hereafter be drawn on him as treasurer and for all other proper and equitable relief and for costs. On presentation of the petition above set forth, a temporary injunction was granted which was later dissolved, from which action plaintiff prosecutes his appeal to this court.

The only law for levying a tax to provide a fund with which to co-operate with the State Board of Agriculture in the work of eradicating the cattle tick, by the excise boards of the different counties, is found in sections 1 and 2, c. 115, p. 255, Sess. Laws 1911. Those portions of these sections pertinent hereto read as follows:

"Section 1. The excise board of any county situated above the state quarantine line as fixed by the State Board of Agriculture, shall have power to levy a tax on all taxable property within the county to provide a fund with which to co-operate with the State Board of Agriculture in the work of eradicating ticks of the variety above mentioned, which fund may be used for any one or all of the purposes of constructing suitable dipping vats, or employing competent live stock inspectors, for purchasing material for disinfection or for anything which in the opinion of the board of county commissioners promises to further the protection of the live stock interests of the county.

"Sec. 2. When so petitioned by a majority of the voters of any county or municipal township within the county, such majority to be measured by the number of votes cast at the last general election, the excise board of any county shall make a levy on all taxable property of the county, such as will be necessary to bear the actual cost of co-operating with the State Board of Agriculture as provided for in section 2, of this act, and to establish and construct one substantial dipping vat or as many of said vats of necessary dimension as may be advised by the State Board of Agriculture," etc.

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Although several propositions are argued by counsel to sustain the judgment, from the view which we take of this case it will be necessary only to pass upon the one involved in a construction and application of the foregoing statutes. Counsel for plaintiff contend that the action of the excise board of Garvin county in levying a tax for the eradication of cattle ticks on its own motion and without the petition as required in section 2 of the act above quoted is void, and hence there is no fund available and against which to allow or out of which to pay any of the claims in question. In answer to this contention, counsel for defendants insist that the first section above quoted, providing that "the excise board of any county situated above the state quarantine line as fixed by the State Board of Agriculture, shall have power to levy a tax on all taxable property within the county to provide a fund with which to co-operate with the State Board of Agriculture in the work of eradicating ticks," etc., gives the county authorities of Garvin county the power, in their discretion, to provide a fund by taxation for tick eradication which would become mandatory only on a petition being presented in accordance with the next succeeding section. With this contention we are unable to agree.

The statutes in question are clear and unambiguous and susceptible of but one construction. It is held by both the courts of England and the United States that statutes requiring or authorizing a levy of taxes or duties on subjects or citizens are to be construed most strongly against the government, and in favor of the subjects or citizens, and that their provisions are not to be extended by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy. *United States v. Wigglesworth*, 2 Story, 369; Fed. Cas. No. 16,690. In the case of *McNally v. Field* (C. C.) 119 Fed. 445, the court held in the syllabus that:

"Where a statute imposing a tax is susceptible of two constructions, and the legislative intent is in doubt, the doubt should, as a rule, be resolved in favor of the taxpayer."

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To the same effect, see Lewis' Sutherland, Statutory Construction (2d Ed.) sec. 535; Cooley on Taxation (3d Ed.) p. 454, and cases cited; *Mayor v. Hartridge*, 8 Ga. 30.

Garvin county is located partly above and partly below the state quarantine line as fixed by the State Board of Agriculture, and, when the board of county commissioners thereof is petitioned by a majority of the voters therein or of any municipal township in the county, all taxable property in the county may be subjected to a levy for the purpose of co-operating with the State Board of Agriculture in constructing dipping vats or in any other way protecting the live stock interests of the county. In the case at bar, as above declared, the levy was not made according to the law authorizing the levy, and is therefore void.

The balance of the questions presented are of practice, do not go to the merits of the action, and, after an investigation and consideration thereof, in our judgment are without substantial merit.

The order of the trial court dissolving the temporary injunction is reversed, and the cause is remanded to the trial court to take further proceedings in accord with this opinion.

All the Justices concur.

YALE THEATER CO. v. CITY OF LAWTON *et al.*

No. 4631. Opinion Filed February 11, 1913.

(130 Pac. 135.)

1. **INJUNCTION—Violation of Ordinance—Irreparable Injury.** A prosecution for violation of a municipal ordinance will not be enjoined on the mere ground that the ordinance is void, because such invalidity constitutes a complete defense to the prosecution, and is thus available in a court of law.

(a) However, equity will restrain, by injunction, criminal proceedings under an invalid ordinance, which, if allowed to proceed, would destroy property rights and inflict irreparable injury.

2. **APPEAL AND ERROR—Discretion of Trial Court—Dissolution of Temporary Injunction.** The dissolution of a temporary injunction is usually in the discretion of the court, and will not be held erroneous, except in case of manifest abuse or on clear showing of error.

(Syllabus by the Court.)

Opinion of the Court.

*Error from District Court, Comanche County;
J. T. Johnson, Judge.*

Action by the Yale Theater Company against the City of Lawton and others. Judgment for defendants, and plaintiff brings error. Dismissed.

Key & Michaelson, for plaintiff in error.

C. C. Black, for defendants in error.

WILLIAMS, J. On October 29, 1912, the plaintiff in error, as plaintiff, began an action in the lower court against the defendants in error, city of Lawton, A. R. McLennan, commissioner of finance, M. A. Nelson, commissioner of public property, and George Short, commissioner of public safety, as defendants, praying that "an injunction issue against the defendants * * * and their agents and employees, restraining them and each of them from enforcing" parts of a certain ordinance.

Upon application, "a temporary injunction" was granted, restraining said defendants, "their servants and agents from enforcing" said ordinance, or certain parts thereof; and it was further ordered "that the 4th day of November, 1912, is hereby set for the time for hearing and determining said petition for injunction."

On November 2, 1912, defendants filed a motion to vacate the "temporary restraining order," and on November 4, 1912, the court having heard the motion "to have the temporary injunction heretofore issued dissolved," the same was taken under advisement. On November 9th the court sustained the motion "to dissolve the temporary injunction." The decree or judgment recites that the motion filed "to dissolve and set aside the temporary restraining order" was sustained.

On November 12, 1912, a motion for a new trial was filed and overruled; the plaintiff being granted an extension of seventeen days in which to make and serve its case-made, and the defendants five days in which to suggest amendments to the case-made, the same to be settled on three days' notice by either party. See *Reynolds v. Phipps et al.*, 31 Okla. 788, 123 Pac. 1125.

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The defendants in error move to dismiss this appeal, on the ground that the temporary injunction was a temporary restraining order, and that the same spent its force on November 4th, the day set for hearing as to the granting of the temporary injunction, as no action was taken by the court to make it further effective, or to continue it in force; and that on November 9th, when the court entered an order purporting to dissolve the same, there was no order in force then to be dissolved. If this was a restraining order and not a temporary injunction, the contention is well taken. *Ex parte Grimes*, 20 Okla. 446, 94 Pac. 668.

Assuming, for the purpose of this case, that it had the effect of a temporary injunction, should the order be affirmed?

In *Thompson v. Tucker*, 15 Okla. 486, 83 Pac. 413, 6 Ann. Cas. 1012, paragraph two of the syllabus is as follows:

"A prosecution for violation of a municipal ordinance will not be enjoined on the ground that the ordinance is illegal, as that fact is a defense to the prosecution."

The same rule is announced in *Golden v. Guthrie*, 3 Okla. 128, 41 Pac. 350.

It also seems to be settled that equity will restrain, by injunction, criminal proceedings under an invalid ordinance, which, if allowed to proceed, would destroy property rights and inflict irreparable injury. *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169; *Southern Express Co. v. Ensley* (C. C.) 116 Fed. 756; *Montgomery v. Louisville, etc., R. Co.*, 84 Ala. 127, 4 South. 626; *Platte, etc., Canal, etc., Co. v. Lee*, 2 Colo. App. 184, 29 Pac. 1036; *Poyer v. Des Plaines*, 123 Ill. 112, 13 N. E. 819, 5 Am. St. Rep. 494; *Davis v. Fasig*, 128 Ind. 271, 27 N. E. 726; *Newport v. Newport, etc., Bridge Co.*, 90 Ky. 193, 13 S. W. 720, 8 L. R. A. 484; *Boyd v. Frankfort*, 117 Ky. 199, 77 S. W. 669, 111 Am. St. Rep. 240. See, also, *Davis, etc., Mfg. Co. v. Los Angeles*, 189 U. S. 207, 23 Sup. Ct. 498, 47 L. Ed. 778; *Ignaz v. Knoxville*, 1 Tenn. Ch. App. 1.

The bill seeking the injunction must set out facts which will enable the court to say whether the injury will be irreparable; and that such will be the character of the injury must clearly appear. *Orange City v. Thayer*, 45 Fla. 502, 34 South. 573.

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In *Mobile v. Louisville, etc., R. Co.*, 84 Ala. 115, 4 South. 106, 5 Am. St. Rep. 342, it appeared that a railroad had acquired a vested right in the streets of a city for certain purposes. It was held that the enforcement of a penal ordinance interfering with this right would be enjoined.

The dissolution of a temporary injunction is usually in the discretion of the court, and will not be held erroneous, except in case of manifest abuse or on clear showing of error. *Cunningham v. Ponca City*, 27 Okla. 858, 113 Pac. 919; *Bristow v. Carriger et al.*, 24 Okla. 324, 103 Pac. 596, 25 L. R. A. (N. S.) 451.

The appeal is dismissed.

All the Justices concur.

CATRON v. DEEP FORK DRAINAGE DIST. NO. 1.

No. 2935. Opinion Filed February 11, 1913.

(130 Pac. 263.)

1. **JURY—Appeal from Drain Commissioners—Trial by Jury.** A landowner, who appeals from the decision of the board of commissioners upon his exceptions to the action of the viewers, on the ground that they had assessed his land too much, pursuant to Comp. Laws 1909, sec. 3057, is not entitled to a trial by jury upon that issue in the district court.
2. **DRAINS—Appeal—Burden of Proof.** A landowner, who excepts to the action of the viewers upon the third ground set forth in section 3057, Comp. Laws 1909, or upon the ground that his land was assessed too much, on trial of his appeal in the district court, has the burden of that issue.

(Syllabus by the Court.)

Error from District Court, Oklahoma County;
Geo. W. Clark, Judge.

Action by H. S. Catron against the Deep Fork Drainage District No. 1. Judgment for defendant, and plaintiff brings error. Affirmed.

Jas. L. Brown, for plaintiff in error.

Grant Stanley, for defendant in error.

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TURNER, J. On December 7, 1908, there was filed in the office of the county clerk of Oklahoma county a petition praying for the establishment of a drainage district, to be known as Deep Fork Drainage District No. 1, and located in Oklahoma county, pursuant to Comp. Laws 1909, secs. 3043 to 3077, inclusive. Thereafter bond was filed and notice given, and the district duly established. Upon the coming in of the report of the viewers, appointed to assess the benefits and damages, exceptions were filed thereto by plaintiff as to the amount assessed against certain lands belonging to him and the damages allowed for right of way, alleging that the latter were inadequate and the former excessive for certain reasons therein set forth. Thereafter the same came on to be heard; whereupon the board, without objection, struck out the amount allowed for damages, confirmed the assessment of benefits, assessed the same against the land, and plaintiff appealed to the district court. There, on August 26, 1910, the cause coming on to be heard, the court, without objection, the question having been eliminated before the board, dismissed the matter of damages and proceeded to try the question of the assessment of benefits; whereupon plaintiff demanded a jury trial, which was by the court refused. He then moved to require the defendant to first produce its evidence, contending that the burden of proof was there, which was overruled, and exceptions saved on both points. Then, after hearing the evidence and being duly advised, the court found the issue in favor of defendant, and ordered that the assessments of benefits theretofore made by the board of viewers and confirmed by the board of county commissioners be confirmed, and that the clerk of the court certify to the county clerk of the county judgment to that effect, and that there be entered upon the assessment roll of Deep Fork Drainage District No. 1 the assessment of benefits theretofore confirmed by the county commissioners against the lands of plaintiff. After motion for a new trial filed and overruled, plaintiff brings the case here, and assigns that the court erred in refusing to allow him a jury trial upon the question of benefits.

Opinion of the Court.

The point is not well taken. While "all questions" made by plaintiff's exceptions are, by statute, directed to be heard and determined by the board, "either or any" of certain questions only are thus authorized to be heard and determined on appeal therefrom to the district court, and among them the very question for the determination of which a jury trial was invoked by plaintiff. By Comp. Laws 1909, sec. 3050, the return of the reviewers must state:

"* * * The names and residences of the owners that will be benefited, damaged, or condemned by or for the improvements, and the damage or benefits to each tract of forty acres, or less, and make separate estimate of the cost of location and construction, and apportion the same to each tract in proportion to the benefits or damages that may result to each."

Section 3057:

"Any person whose lands are affected by the proposed improvement may, on or before the day set for hearing before the commissioners, file exceptions to the apportionments made by, and the action of the viewers, upon any claim for compensation or damages. The commissioners may hear testimony and examine witnesses upon all questions made by such exceptions, and for that purpose may compel the attendance of witnesses and the production of other evidence, and its decision upon each of the exceptions shall be entered of record. * * * Any person aggrieved may appeal from the order of the commissioners, and upon such appeal there may be determined either or any of the following questions: 1st. Whether just compensation has been allowed for property apportioned. 2nd. Whether proper damages have been allowed for property prejudicially affected by the improvements. 3rd. And whether the property for which an appeal is prayed has been assessed more than it will be benefited, or more than its proportionate share of the cost of the improvements."

Concerning procedure, section 3058 provides:

"The district clerk shall docket said appeal, in the district court, styling the appellant as plaintiff, and the drainage district, giving its name and number, as defendant, and the cause shall stand for trial and be heard and determined as other appealed cases are tried in the district court. After the appeal is heard and determined in the district court, the district clerk shall return the original papers filed in his office by the county clerk, together with a transcript of the proceedings held in said cause in the district court, including a certified copy of the finding,

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verdict, judgment or decree of said court; the district clerk shall also return an itemized statement of the costs accruing on the appeal, and such cost shall be paid as hereinbefore provided. The commissioners shall thereby cause such entry to be made on their record which may be necessary to give effect to the judgment of the district court."

Comp. Laws 1909, sec. 1690, further provides:

"From all decisions of the board of commissioners upon matters properly before them, there shall be allowed an appeal to the district court by any person aggrieved."

And section 1693:

"All appeals thus taken to the district court shall be docketed as other causes pending therein, and the same shall be heard and determined *de novo*"

—showing that this appeal is to be tried *de novo* and "as other appealed cases are tried in the district court."

Section 5784a reads:

"A trial is a judicial examination of the issues, whether of law or fact, in an action."

Section 5785:

"Issues of law must be tried by the court, unless referred. Issues of fact arising in actions for recovery of money or of specific real or personal property shall be tried by a jury unless a jury trial is waived or a reference be ordered as hereinafter provided."

Section 5786:

"All other issues of fact shall be tried by the court, subject to its power to order any issue or issues to be tried by a jury, or referred as provided in this Code."

We are therefore of opinion that, as the issues involved in the assessment of benefits to the land in question were not "issues of fact arising in actions for recovery of money, or to recover real or personal property," but were "other issues of fact," the court did not err in overruling plaintiff's request to try them to a jury, as the court was required, by section 5786, to try them himself, subject to his power to order the same tried to a jury, as therein set forth.

Nor does article 2, section 19, of the Constitution, which provides, "The right of trial by jury shall be and remain inviolate, * * *" protect plaintiff in his right to a trial by jury in this

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case. This for the reason that the right so declared, except as modified by the Constitution, means the right as it existed in the territory at the time of the adoption of the Constitution (*State v. Cobb*, 24 Okla. 662, 104 Pac. 361, 24 L. R. A. [N. S.] 639; *Baker v. Newton*, 27 Okla. 436, 112 Pac. 1034), and was not intended to extend the right to a trial by jury to the issue of the question of benefits in cases of this kind. See 1 Page & Jones on Taxation, sec. 202. Nor are we so sure that, being here involved the determination of the first two of the three questions set forth in section 3057, *supra*, plaintiff would be entitled to a jury trial upon either or both such questions, as he contends and argues *eo conveniente*. This for the reason that in *Riley, Co. Clerk, v. Carico et al.*, 27 Okla. at page 37, 110 Pac. 740, we said:

"Section 24, art. 2, Const., having no application to drainage or improvement districts, where the expense of constructing same is borne by the land affected or benefited, is not a limitation upon any of the provisions of article 16 of the Constitution."

But upon this we express no opinion.

There is no merit in the contention that the court erred in holding the burden of proof to be upon plaintiff. This is the manifest intent of the statute (section 3058), when it directs, as it does, that the appellant shall be styled as plaintiff and the drainage district as defendant. This is, in effect, saying that the remonstrant before the board should be the remonstrant in the district court, and shall introduce his evidence in support of the issues raised thereby. Or, in effect, that if the assessment of the benefits to his land is too high the burden of proof is upon him to show what it should be. This was, in effect, the holding of the court in *Hardy et al. v. McKinney*, 107 Ind. 364, 8 N. E. 232. In that case, pursuant to a certain act of the Legislature, McKinney filed his petition before the board of commissioners of Carroll county for the same purpose as here. Pursuant thereto, viewers were appointed, and reported in favor of the construction of the ditch, as prayed. Later certain parties of the name Hardy, upon whose land and the land of the petitioner was located the pond sought to be drained by the proposed ditch, filed a remonstrance against its construction, and also a claim for compensation. Viewers were thereupon appointed, who reported

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in general terms against the Hardys; whereupon the board of commissioners ordered the establishment and construction of the ditch. The Hardys appealed to the circuit court, which proceeded to try the issues presented by the petition and the remonstrance. There was judgment for the petitioner and against the remonstrators, the Hardys, as to damages, and the Hardys took the case to the Supreme Court. Thereafter reciting that the act of 1875 contained a provision providing that, "Any party aggrieved may appeal to the circuit court as provided by law for appeals from commissioners" (Laws 1875, p. 99, sec. 10), and that the statute governing appeals from boards of commissioners provided that "all appeals thus taken to the circuit * * * court shall be docketed among the other causes pending therein, and the same shall be heard, tried and determined as an original case" (1 Rev. St. 1876, p. 357, sec. 36), the court said:

"Under this provision of the statute, it has always been held that appeals from commissioners stand for trial *de novo* in the circuit court; that is, that all matters in issue before the commissioners stand for trial anew in the circuit court, and not for review or correction as in a court of errors. As a necessary consequence, it has been further held that such appeals suspend all the proceedings had upon questions in issue before the commissioners; and that such proceedings cannot either be used or taken into consideration upon the trial *de novo* in the circuit court. These holdings are, as they long have been, the established law of this state. [Citing.] In appeals to the circuit court in causes like the one in hearing, and in all analogous cases, the court or jury trying the same succeeds to all the substantial duties which devolved upon the viewers and reviewers before the board of commissioners as to the matters which stand for trial *de novo*; and a finding or verdict in detail upon all the matters in issue between the parties is contemplated. This includes the assessment of benefits and the allowance of damages, in cases in which damages ought to be allowed. The finding or verdict ought to be sufficiently specific upon every question involved to authorize a judgment finally determining all the matters in controversy, and leaving nothing for the adjudication of the commissioners in the event that the cause shall be certified back to them."

And, after commenting upon the fact that the cause should have been styled John McKinney v. Alexander Hardy *et al.*,

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instead of the reverse, as it was, so far recognized the statute as placing the burden in the trial court upon the remonstrators that the same was not questioned.

In *Conwell et al. v. Tate et al.*, 107 Ind. at page 171, 8 N. E. 36, it is expressly held that a landowner, who remonstrates on the single ground that his land is assessed for too much, has the burden of the issue. See, also, 2 Page & Jones on Taxation and Assessment, sec. 923.

We are therefore of opinion that the trial court did not err in placing the burden where it did; and for that reason, and finding no error in the record, the judgment is affirmed.

HAYES, C. J., and KANE and DUNN, JJ., concur; WILLIAMS, J., concurs in the conclusion.

JONES v. JONES.

No. 3530. Opinion Filed February 11, 1913.

(130 Pac. 199.)

APPEAL AND ERROR—Settlement of Case-Made—Dismissal. A proceeding in error brought to this court on a case-made, where it does not appear from the record or otherwise that the defendant in error was present, either personally or by counsel, at the settlement, or that notice of the time thereof was served or waived, or what amendments suggested, if any, were allowed or disallowed, will be dismissed on motion of defendant in error.

(Syllabus by the Court.)

Error from District Court, Beaver County;
R. H. Loofbourrow, Judge.

Action between W. I. Jones and Winona Jones. From the judgment, Winona Jones brings error. Dismissed.

Claud T. Smith, E. J. Dick, J. W. Culwell, and Charles Swindall, for plaintiff in error.

Dickson, Rush & Dickson and Gray & McFay, for defendant in error.

Shawnee Gas & Electric Co. v. Corporation Commission of Oklahoma.

DUNN, J. Counsel for defendant in error have filed a motion to dismiss this appeal, for the reasons, among others, that it does not appear from the record or the purported case-made, or otherwise, that the defendant in error was present, either personally or by counsel, at the settlement, or that notice of the time and place thereof was served or waived, or what amendments suggested, if any, were allowed or disallowed by the court. These grounds are sufficient, and require the dismissal of the case-made, if true. An inspection of the record shows that it supports the claims made, and under the law there is no alternative but to sustain the motion. The proceeding in error is accordingly dismissed. See *Cobb & Co. et al. v. Hancock*, 31 Okla. 42, 119 Pac. 627; *Richardson v. Thompson*, 33 Okla. 120, 124 Pac. 64; *First Nat. Bank of Collinsville v. Daniels*, 26 Okla. 383, 108 Pac. 748, and cases therein cited.

HAYES, C. J., and KANE and TURNER, JJ., concur; WILLIAMS, J., absent, and not participating.

SHAWNEE GAS & ELECTRIC CO. v. CORPORATION
COMMISSION OF OKLAHOMA.

No. 3795. Opinion Filed February 11, 1913.

(130 Pac. 127.)

GAS—Supply to Private Consumers—Regulation of Charges. Section 18, art. 9, of the Constitution does not confer upon the Corporation Commission jurisdiction and power to prescribe the rates and charges for service to be rendered by a gas company furnishing gas within the limits of a city under franchise from the city, and that, too, whether the city has authority conferred upon it by Comp. Laws 1909, sec. 693, to regulate the charges therefor or not. Neither is such jurisdiction conferred by Comp. Laws 1909, sec. 8812.

(Syllabus by the Court.)

Application by the Shawnee Gas & Electric Company against the Corporation Commission of Oklahoma for writ of prohibition. Writ granted.

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Flynn, Chambers, Lowe & Richardson and Edward Howell,
for petitioner.

Chas. West, Atty. Gen., *Chas. L. Moore*, Asst. Atty. Gen.,
and *E. C. Patton*, for defendant.

TURNER, J. This is an application for a writ of prohibition. From the petition and return to the alternative writ it appears that on September 28, 1906, the Shawnee Gas & Electric Company was granted a franchise by the city of Shawnee, for a period of 21 years, to furnish natural gas to the city and its inhabitants at a rate fixed by the city of not to exceed ²⁵35 cents per thousand cubic feet, with a minimum monthly charge of 50 cents; that said franchise was accepted, and the company proceeded to lay its mains, build its plant, and avail itself of the privileges granted by the franchise, which it did at rates not exceeding the rates therein provided, confining its business under the charter to within the limits of said city; that thereafter came Shawnee City Waterworks and persons resident in the city and customers of petitioner, Shawnee Gas & Electric Company, and filed their several complaints with the Corporation Commission, representing thereto that the charges made by petitioner for natural gas were excessive, and asked the commission to compel said company to reduce its rates and fix the price to be charged by said company at not to exceed 35 cents per thousand cubic feet, which the commission did, on December 13, 1910, after hearing duly had, and issued order No. 409, purporting to fix said rates within said city on a schedule lower than those fixed in said franchise, and at not exceeding 35 cents per thousand cubic feet, and when the commission sought to execute the same, this proceeding was commenced.

It is contended by petitioner that said order is void as beyond the power of the commission to make. This for the reason, it is urged, that petitioner is a public service corporation; that the city had the governmental power to fix said rates, which it did in section 2 of the charter, pursuant to legislative grant contained in Comp. Laws 1909, sec. 693, then, and conceded yet to be, in force, which reads:

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"The council may provide for, and regulate the lighting of the streets, the erection of lamp posts, and the council shall have the power to make contracts with, and authorize any person, company or association to erect gas or electric works in said city and give such person, company or association the privilege of furnishing gas or electricity to light the streets, alleys and lanes of said city for any length of time, not exceeding twenty-one years. But no such grant shall be so conditioned as to prevent the council from granting to other persons, or companies, or corporations, the right to use the streets for lighting purposes; all such grants shall be subject at all times to reasonable regulation by ordinance, as to the use of streets and prices to be paid for gas or light."

—And which, having been thus conferred and exercised prior to the adoption of the Constitution, the right thus fixed falls within the protection of the proviso in section 18, art. 9, thereof. That petitioner is a public service corporation is conceded, but whether the city at the time of the granting of the franchise relied on was vested, in virtue of section 693, *supra*, with power to fix said rate, it is unnecessary to decide for the reason, that, whether it was or was not, if the Corporation Commission was without power derived from constitutional grant to regulate petitioner's rates, the order complained of purporting so to do is void for want of jurisdiction, and this writ should run.

This sends us first to its general grant of power to fix rates and charges for services, which is found in section 18, art. 9, *supra*, and which, so far as the same affects the question here involved, reads:

"The commission shall have the power and authority and be charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this state, in matters relating to the performance of their public duties and their charges therefor and of correcting abuses and preventing unjust discrimination, and extortion by such companies; and to that end the commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations and requirements, the commission

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may, from time to time alter or amend. * * * The authority of the commission (subject to review on appeal as hereinafter provided), to prescribe rates, charges and classifications of traffic, for transportation and transmission companies, shall, subject to regulation by law, be paramount; but its authority to prescribe any other rule, regulation or requirement, for corporations or other persons, shall be subject to the superior authority of the Legislature to legislate thereon by general laws. Provided, however, that nothing in this section shall impair the rights which have heretofore been or may hereafter be conferred by law upon the authority of any city, town or county to prescribe rules, regulations, or rates of charges to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town or county, so far as such services may be wholly within the limit of the city, town, or county granting the franchise."

When the granting clause, *supra*, of said section says, as it does, that the commission shall have the power of "supervising, regulating and controlling all transportation and transmission companies doing business in the state, in matters relating to the performance of their public duties and their charges therefor," it had no reference to gas companies and hence vested the Corporation Commission with no jurisdiction over petitioner in the matter of regulating its rates, or for any other purpose. This for the reason that petitioner was neither a transportation nor a transmission company within the definition of such companies laid down in article 9, sec. 34. No further grant of power is made down to the proviso in said section; the sole further intent down to that point being to make the power already granted over those companies subject to something, which is done by adding that the power "to prescribe rates for transportation and transmission companies, shall, subject to regulation by law, be paramount but" that "its authority to prescribe any other rule, regulation or requirement for corporations or other persons [no such authority is granted here] shall be subject to the general authority of the Legislature to legislate thereon by general laws." So much for the enacting clause, comprehensively called its purview. Within that purview nothing is said indicating a grant of power to the Corporation Commission over any kind of a public service corporation for any purpose, and hence petitioner, not

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being within the purview, was not intended to be included within its terms and placed within the jurisdiction of the commission for any purpose.

But next we come to the proviso. 2 Lewis, Suth. on Stat. Con., sec. 352, says:

"The proper function of a proviso being to limit the language of the Legislature, it will not be deemed intended from doubtful words to enlarge or extend the act or the provision on which it is engrafted. Where it follows and restricts an enacting clause generally in its scope and language, it is to be strictly construed and limited to objects fairly within its terms"—citing authority.

Now, if the intent of this proviso is to limit the preceding language under construction, which we have said has no application to petitioner, how can it with reason be so construed as to include petitioner within its terms? Why, rather, is it not to be strictly construed, as required by the rule, *supra*, so as to exclude from the general operation of the grant such corporations only as are fairly within its terms? Thus construed, the proviso could not exclude petitioner from the general operation of the grant contained in the enacting clause, for the reason that petitioner was not therein included. In the volume last cited, at page 675, the author says that Story, J., " * * * said that he was led to the general rule of law which has always prevailed, and become consecrated as almost a maxim in the interpretation of statutes, that 'When the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is strictly construed, and takes no case out of the enacting clause which does not fall within its terms.'"

We are therefore of opinion that gas companies are not within the purview of the enactments under construction, but, as to the fixing of their rates, were purposely left to be dealt with by the Legislature. In other words, all that part of the section within said proviso inhibits a construction of said section that will confer upon the commission authority to fix rates for a gas company furnishing gas within the limits of a city under franchise from the city, and that, too, whether the city has authority conferred upon it by Comp. Laws 1909, sec. 693, to regulate rates and charges therefor or not. This construction does not leave

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this proviso without a subject upon which to operate. For what of the numerous street railway and telephone lines, and perhaps other public service corporations, whose rates had been fixed by similar franchises granted by the cities, towns, and counties throughout the state prior to the adoption of the Constitution? These, it would seem, fall within the protection of the proviso, but not the petitioner company for the reasons stated.

As to the remaining questions for determination, we quote from an unpublished opinion of Hayes, J.:

"Since said section 18 does not confer the power upon the commission to regulate and prescribe the rate to be observed by gas companies and other public service corporations, other than transportation and transmission companies, the commission has no such authority, as is contended in this case by the appellees, unless the same may be found in some other section of the Constitution, or in some statute. Section 18, art. 9, of the Constitution authorizes the Legislature to confer upon the commission additional authority to that conferred by the Constitution itself, in the following language: 'The commission may be vested with such additional powers, and charged with such other duties (not inconsistent with this Constitution) as may be prescribed by law, in connection with the visitation, regulation, or control of corporations, or with the prescribing and enforcing of rates and charges to be observed in the conduct of any business where the state has the right to prescribe the rates and charges in connection therewith. * * *' But this section does not in itself confer any additional power upon the commission relative to prescribing and regulating rates and charges for public service corporations. No other sections of the Constitution have been relied upon by appellees as conferring jurisdiction upon the commission in this case, and we know of none that does so.

"Appellees contend, however, that such is the effect of section 8812, Comp. Laws 1909, which reads as follows: 'Whenever any business, by reason of its nature, extent, or the existence of a virtual monopoly therein, is such that the public must use the same, or its service, or the consideration by it given or taken or offered, or the commodities bought or sold herein are offered or taken by purchase or sale in such manner as to make it of public consequence, or to affect the community at large as to supply, demand, or price or rate thereof, or said business is conducted in violation of the first section of this act, said business is a public business, and subject to be controlled by the state.

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by the Corporation Commission or by an action in any district court of the state, as to all of its practices, prices, rates and charges, and it is hereby declared to be the duty of any person, firm, or corporation engaged in any public business to render its services and offer its commodities or either upon reasonable terms without discrimination and adequately to needs of the public, considering the facilities of said business.' The foregoing statute constitutes section 13 of an act of the First Legislature, approved June 10, 1908, entitled, 'An act to define a trust, monopoly, unlawful combination in restraint of trade; to provide civil and criminal penalties and punishment for violation thereof and damages thereby caused; to regulate such trusts and monopolies; to promote free competition for all classes of business in the state; and declaring an emergency.' Sess. Laws 1907-08, p. 750. Neither the foregoing section nor any other section of the act in specific terms confers upon the State Corporation Commission any jurisdiction over public service corporations. The general purpose and scope of the act is clearly and fully outlined in the title. Neither in the title nor in the body of the act is any specific reference made to the regulation of rates and charges of public service corporations. Section 1 makes acts, agreements, and contracts or combinations in the form of trust or in restraint of trade or commerce illegal. Section 2 makes it the duty of the Attorney General, when he shall have sufficient evidence that the law relative to the establishment and maintenance of trusts and monopolies is being, or is about to be, violated 'by any person, firm, corporation or association engaged in any quasi public business or having a virtual monopoly of any commodity or business with the intention or effect of destroying competition or restraining trade, contrary to the provisions of this act,' to file information in the Supreme Court, and by proceeding as against a nuisance enjoin and restrain said combination or arrangement. Section 3 gives the parties who are injured in their business or property by reason of anything forbidden or declared unlawful by the act their remedy for damages. Section 4 makes the provisions of the act applicable to foreign corporations, and prescribes as a penalty for the violation thereof that upon order of the Corporation Commission or a competent court, after due notice and in due course of law, such corporation shall have its license to do business in the state revoked. Section 5 makes it unlawful for foreign corporations or associations engaged in the production, manufacture, distribution, or sale of any commodity of general use, or rendering any service to the public, to discriminate between any person, firm, or association. Section 6 pre-

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scribes the penalty for the violation of the act. Sections 7, 8, and 9 relate to procedure for the enforcement of the act. Section 10 makes certain combinations of business unlawful, and section 11 prescribes a penalty for any corporation that shall own, hold, or control, in any manner whatever, the stock of any competitive corporation engaged in the same kind of business in or out of the state, in violation of the Constitution and laws of the state. Section 12 makes the property of any corporation of the state, or of any foreign corporation, liable for any fines, penalties, or costs assessed against it for the violation of the laws of the state. In none of these sections is there any attempt to confer upon the Corporation Commission jurisdiction to prescribe rates and charges to be observed by any corporation. The sole provision in the act bearing upon this subject is to be found in the foregoing quoted section 13. This section provides that whenever a business shall have certain characteristics, it shall be a public business and shall be subject to the jurisdiction of the Corporation Commission to regulate its practices, rates, and prices; but it does not provide that all public business shall be subject in these respects to such jurisdiction. * * * The first part of said section attempts to define the class of business which the latter part of the section subjects to the jurisdiction of the Corporation Commission and the district courts. It appears to us clear that what was intended was to bring within the jurisdiction of the commission the regulation of charges and rates for services connected with those businesses that violate the acts and are connected, not with business strictly of a public character, such as common carriage, supply of water and gas, but with that class of business in which the owners, without any intent of public service, have placed their property in such a position that the public has an interest in its use.

"The distinction between the class of business and its service intended to be defined by and included in said section and the business and service of public corporations is, we think, well made by Mr. Justice Brewer, who delivered the opinion of the court in *Cotting v. Godard*, 183 U. S. 79 [22 Sup. Ct. 30; 46 L. Ed. 92], in the following language: 'In the one [referring to property devoted to public service] the owner has intentionally devoted his property to the discharge of a public service. In the other, he has placed his property in such a position that, willingly or unwillingly, the public has acquired an interest in its use. In the one he deliberately undertakes to do that which is a proper work for the state. In the other, in pursuit of merely private gain, he has placed his property in such a position that the public

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has become interested in its use. In the one it may be said that he voluntarily accepts all the conditions of public service which attach to like service performed by the state itself; in the other, that he submits to only those necessary interferences and regulations which the public interest required.' It was this second class of business with which we think section 13 was dealing and intended to place under the jurisdiction of the Corporation Commission and the district courts of the state as to all practices, rates, and charges. If this section grants to the Corporation Commission power to prescribe prices, rates, and charges to be charged by any public service corporation, it confers that power as to all public service corporations, for the language that includes one includes all, and no exception is made. The act confers, not only upon the Corporation Commission jurisdiction to prescribe rates and charges under the conditions therein named, but confers also a like and concurrent power upon the district courts of the state. But the power to prescribe and regulate rates and charges to be observed by some public service corporations, to wit, transportation and transmission companies, was conferred exclusively upon the Corporation Commission by section 18, art. 9, *supra*, which was not subject to be altered, amended, or repealed until the second Monday in January, 1909. Section 35, art. 9, Const. It would therefore follow for this reason, if said section includes public service corporations, it would have to be declared in part at least unconstitutional. It would also have to be declared unconstitutional for a second reason. The function of prescribing a schedule of rates and charges to be made by public service corporations in the future for services rendered by them to the public is a legislative function. *Reagan et al. v. Farmers' Loan & Trust Co. et al.*, 154 U. S. 362 [14 Sup. Ct. 1047, 38 L. Ed. 1014]; *Interstate Commerce Commission v. Cincinnati, N. O. & T. R. Co.*, 167 U. S. 479 [17 Sup. Ct. 896, 42 L. Ed. 243].

"Section 1, art. 4, of the Constitution provides that all the powers of government of the state shall be divided into three separate departments, and except as is provided in the Constitution, the legislative, executive, and judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others. The Constitution nowhere authorizes the district courts of the state to prescribe rates and charges to be observed by public service corporations nor does it empower the Legislature to grant to said courts such jurisdiction. If the section under consideration be construed to include public service corporations, it would, in part

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at least, be void, because of its attempting to confer legislative power upon the judicial department. It is a well-settled rule of construction that where a statute is reasonably susceptible of two different constructions—one that will sustain its validity and one that will render it unconstitutional and void—the former is to be adopted."

From all of which we conclude that none of the provisions, *supra*, confers upon the Corporation Commission power to make the order, and for that reason the same is void. But believing as we do that in view of what we have said the commission will make no further attempt to enforce the order, the writ will be withheld until the further order of the court.

All the Justices concur.

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No. 4166. Opinion Filed February 11, 1913.

(130 Pac. 151.)

CARRIERS—Fares—Order of Corporation Commission. Appellant's evidence examined, and held sufficient to overcome the *prima facie* presumption of the reasonableness, justness, and correctness of the order appealed from.

(Syllabus by the Court.)

Appeal from the State Corporation Commission.

From an order of the Corporation Commission fixing rates of the Oklahoma Railway Company, the latter appeals. Reversed.

Shartel, Kcaton & Wells, for plaintiff in error.

Chas. West, Atty. Gen., and *Chas. L. Moore*, Asst. Atty. Gen., for the State.

TURNER, J. This is an appeal from an order of the Corporation Commission requiring that appellant, operating an interurban railway through Britton to Edmond, shall charge ten cents for all students attending the Wesleyan Female College

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from College Park station to Oklahoma City and from Oklahoma City to College Park station, and shall sell round-trip tickets to all others at not exceeding 25 cents each, or single trip tickets at not exceeding fifteen cents each, to take effect on and after March 24, 1912.

In support of the order W. A. Shelton testified before the commission that he was president of said college; that they were trying to establish a school out there, to accomplish which it was necessary to have the patronage of Oklahoma City; that it was almost impossible so to do at a rate that cost the students 30 cents each day for the round trip from the city; that the college was in the corporate limits of Britton, which enjoyed a ten-cent rate; that the distance was about the same to College Park station as to Putnam City, which had that rate, and that said rate would, in his opinion, increase the attendance of the school and travel to and from the city; that the distance from Main street in Britton to the college was about a half mile; that the enrollment of the college was about 90, about half of which were boarding students and most of the remainder residents of Oklahoma City, and that the present ten-cent rate ends about two blocks north of Britton and somewhere near a mile and a half from College Park station. O. F. Sensebaugh, presiding elder of the Oklahoma City district of the M. E. Church South, and a member of the board of trustees of the college, stated that the rate to and from the school had much to do with its patronage; that the school was indorsed by the annual conferences and others representing a membership of about 65,000 and a constituency of three or four times that in the state; that they expected to make it one of their great schools, and wanted to be given the best opportunity possible to do so. It was his opinion that it would be to the best interest of the company to grant the rate because of the increased patronage it would have, but did not know of any road whose rate for nine or ten miles was a dime on interurban cars. This was all the evidence adduced in support of the order.

In opposition thereto John W. Shartel testified: That College Park is on the interurban running from Oklahoma City to

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Edmond, the total length of which from the terminal station within the city to First street in Edmond is fifteen and one-tenth miles, and the through rate on appellee's car 25 cents, with the following breaks: "From terminal station to Belle Isle station four and one-half miles, five cents; from Belle Isle station to Britton station, five cents; from Britton station past College Park station to the next break in fare, two and one-fourth miles north of Britton station, five cents; from said point two and one-fourth miles, five cents; from said last-named point to Edmond, five cents; the distance from College Park station to Oklahoma City terminal station being nine and six-tenths miles." That College Park is on the third section towards its north end, and about three-fourths miles from the twenty-cent rate, and that at that time said line was not paying over two-thirds actual operating expenses. That the rate to Putnam City is ten cents for a distance of eight and two-tenths miles, which was two-tenths miles longer than that to Britton. That the rate to Bethany, which is four-tenths miles closer and a much larger school, is fifteen cents and no reduction. That other suburban lines of the company were not paying a fair value, neither was appellant's road as a whole. That appellant had taken money which might have been paid to its stockholders on the main system and appropriated it to the upkeep of these outside lines, waiting for the people to move in and build up the country. That a ten-cent rate to this school would result in charging ten cents for ten miles, and fifteen cents for five miles from that point on to Edmond, or would result in having to cut out five cents on the Edmond run and hauling through for twenty cents.

As a part of the record, the commission, pursuant to Const. art. 9, sec. 22, files for our consideration a written statement of the reasons upon which the order is based. The material part of it reads:

"It is insisted by the defendant that this line is being operated at a loss. No figures were submitted to the commission showing the earnings and expense, and evidence that only states conclusions is as a rule unsafe to predicate a finding of facts, therefore no finding will be made upon that point. The president of the college and the presiding elder for this district state that this

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college was established by the Southern Methodist Church, and is known as the Wesleyan Female College. This church represents a membership of about 65,000 people, and a constituency of about three or four times that amount in Oklahoma and adjoining states. They proposed to make it one of the great schools of the West, and it is insisted by these witnesses that, if proper rates were given from Oklahoma City, it would have a tendency to more than double the attendance. It does not cost the company but slightly more, if any, to operate cars filled with passengers than it does to operate them comparatively empty. The reduction of rates does not always reduce gross revenue. It has been the policy of the commission going over the statistics in regard to passenger rates in general that the reduction of rates more often increases revenue than diminishes it. For an additional distance of slightly over one mile beyond Britton the defendant insisted on charging five cents additional fare. The commission is of the opinion based on all the evidence and circumstances in this case that rate of ten cents from Oklahoma City to College Park station for all students attending the college would be reasonable, and that it would have a tendency and would in fact increase the travel without increasing the expense; that a rate for all other than students should be fifteen cents for single trips or should be 25 cents for the round trip. Our conclusions in this case are argumentative, in that all interurbans, street railways, and steam railroads give commutation tickets to any number of people who regularly go to and from a given point."

If there is any evidence reasonably tending to support the order, the *prima facie* presumption that the same is reasonable and just obtains by reason of Const. art. 9, sec. 22, otherwise not. *A., T. & S. F. Ry. Co. v. State*, 28 Okla. 476, 114 Pac. 721. Such there is not. The most that can be said in favor of the order is that it is based upon testimony merely expressive of a desire for the rate in order to build up the school. This is no substantial basis for the order. But opposed to this is the uncontradicted evidence of Mr. Shartel as follows:

"That line is being operated, and, with the possible exception of June, July, and August, has been operated ever since it opened, at a loss. By a loss I mean to say the payment of the actual operating expenses of the line itself without any return for interest on the investment or any allowance for depreciation. The line is being and has been run at a loss, and at the present time from Oklahoma City through Britton to Edmond is not paying

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over two-thirds of its actual operating expense. The giving of a rate of a cent a mile or a cent and a tenth or whatever it figures out for that distance out there would mean that for every ten cents we take in we would be paying out at least fifteen."

As stated by us in *A., T. & S. F. Ry. Co. et al. v. State*, 27 Okla. 820, 117 Pac. 330:

"Courts are not permitted to disregard the uncontradicted evidence of competent, unimpeached witnesses. If an order requires evidence to support it and all the evidence introduced is to the effect that the order is unreasonable, and ought not to be made, it seems axiomatic to say it would be error to enter it."

And so we say that, as this order is based upon testimony merely expressive of a desire for the rate and in opposition to uncontradicted evidence, in effect, that such a rate, if enforced, would compel appellant to operate at a still greater loss, the same is unreasonable and unjust.

It is therefore reversed, and the rate thereby sought to be displaced is ordered to stand.

HAYES, C. J., and KANE and DUNN, JJ., concur; WILLIAMS, J., not participating.

PAIN et al. v. WYLIE et al.

No. 4358. Opinion Filed February 11, 1913.

APPEAL AND ERROR—Settlement of Case—Made—Dismissal. A proceeding in error brought to this court on a case-made, where it does not appear from the record or otherwise that the defendant in error was present, either personally or by counsel, at the settlement, or that notice of the time thereof was served or waived, or what amendments suggested, if any, were allowed or disallowed, will be dismissed on motion of defendant in error.

(Syllabus by the Court.)

Error from District Court, Kingfisher County;
James W. Steen, Judge.

Action between G. S. Pain and others and R. W. Wylie and others. From the judgment, G. S. Pain and others bring error. Dismissed.

Peck v. Stephens et al.

McKeever, Walker & Church, for plaintiffs in error.

W. L. Moore, for defendants in error.

HAYES, C. J. The proceeding in error in this case is prosecuted by petition in error and case-made. It does not appear from the record or otherwise that defendants in error were present, either in person or by counsel, at the settlement of the case-made, or that notice of the time and place of settlement was ever served upon or waived by defendants in error, or whether any amendments were suggested, and if any were suggested, what amendments were allowed or disallowed. Under this condition of the record, the case-made must be treated as a nullity and the cause dismissed. *First Nat. Bank of Collinsville v. Daniels*, 26 Okla. 383, 108 Pac. 748; *Cobb & Co. et al. v. Hancock*, 31 Okla. 42, 119 Pac. 627; *Lister et al. v. Williams*, 28 Okla. 302, 114 Pac. 255; *Richardson v. Thompson*, 33 Okla. 120, 124 Pac. 64; *Jones v. Jones*, ante, 130 Pac. 199.

All the Justices concur.

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No. 4417. Opinion Filed February 11, 1913.

(130 Pac. 276.)

APPEAL AND ERROR—Case-Made—Failure to File. The case-made, or a copy thereof, not having been filed with the papers in the case in the court below, is a nullity, and cannot be considered in this court for the purpose of reviewing matters complained of in the trial court.

(Syllabus by the Court.)

Error from District Court, Stephens County;
Frank M. Bailey, Judge.

Action between P. H. Peck and Dan Stephens and others. From the judgment, Peck brings error. Dismissed.

H. B. Lockett, for plaintiff in error.

Wilkinson, Morris & Speer, for defendants in error.

Maples et al. v. Smythe.

DUNN, J. The sufficiency of the purported case-made in the above-entitled proceeding in error, to support the petition in error, is challenged in a motion to dismiss on the ground, among others, that neither the case-made nor a certified copy thereof was filed in the office of the clerk of the district court. The order from which the appeal was sought to be taken was rendered on the 1st day of April, 1912.

The motion must be sustained; the rule being that the case-made, or a copy thereof, must be filed with the papers in the case in the court below, or it is a nullity, and cannot be considered in this court for the purpose of reviewing matters complained of in the trial court. See *Abbott v. Rodgers*, ante, 128 Pac. 908, and cases cited therein.

All the Justices concur.

MAPLES *et al.* v. SMYTHE.

No. 2422. Opinion Filed February 11, 1913.

(130 Pac. 445.)

FORCIBLE ENTRY AND DETAINER—Evidence—Sufficiency. Where, in forcible entry and detainer, giving the evidence its strongest probative force, there is no evidence reasonably tending to prove that defendant was in possession of the premises in controversy at the commencement of the suit, held, that the court did not err in sustaining a demurrer to the evidence at the close of plaintiffs' testimony.

Error from Creek County Court;
Josiah G. Davis, Judge.

Action by Elizabeth Maples and others against William Smythe. Judgment for defendant, and plaintiffs bring error. Affirmed.

McDougal, Lattimore & Lytle, for plaintiffs in error.

Pryor, Rockwood & Lively, for defendant in error.

TURNER, J. On March 12, 1909, Elizabeth Maples, E. J. Maples, and A. A. Maples, plaintiffs in error, sued William

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Smythe, defendant in error, before a justice of the peace in Creek county in forcible entry and detainer for "a certain brick house at 204 North Birch street, city of Sapulpa; and the lands consisting of what was all of block 3 in the old plat of the town-site of the city of Sapulpa." After answer filed, in effect a general denial, there was trial and judgment for defendant. On trial anew in the county court, to which the cause was appealed, at the close of plaintiffs' testimony a demurrer was sustained to the evidence, and judgment rendered and entered accordingly, and plaintiffs bring the case here, assigning as error the action of the court in sustaining the demurrer.

To maintain the issues on their part plaintiffs, after proof of three days' notice to quit, proved that, after one Egan had been in peaceable possession of the premises in controversy for some eight years, he turned it over to D. P. Maples, who fenced the same, and built thereupon a small brick house, and died in May, 1908, after years of peaceable possession; that plaintiff Elizabeth is his widow and the other two plaintiffs his children; that while Maples lived Egan acted as his agent and rented the same to one Sherry, who occupied the same for two months with a stock of goods which he, after the death of Maples, sold out and turned over, together with possession of the premises, to Charlie Smythe, who occupied the house until January, 1909. But here the evidence fails. As set forth in the brief of plaintiffs in error, the most that can be said of it is that defendant was never in actual possession, but, Charlie Smythe having moved out, the premises were unoccupied at the time this notice was given and suit commenced. The only evidence set forth in the brief tending to couple defendant with the possession was that he had told a witness that he, William Smythe, had "staked his brother, Charlie Smythe, in the premises several times and that no rent would be paid," and that thereupon notice to quit was served on defendant and this action commenced, which notice was in March after Charlie had quit in the preceding January. The same witness further testified that defendant, on a former trial of some kind somewhere, had testified that he claimed, at a time not given, to be in possession of said premises under a quit-

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claim deed from one Kidd. If other evidence exists coupling defendant with possession of the premises at the time of the commencement of this action, it is not contained in the abstract set forth in plaintiffs' brief, and we decline to inspect the record to find it. Applying the rule invoked by defendant that actions of this kind may be maintained only against one in possession at the commencement of the action and not against one who does not in fact hold the land (19 Cyc. 1142, 1163), there being no evidence reasonably tending to prove such possession in defendant at that time, the judgment of the trial court is affirmed.

HAYES, C. J., and KANE and DUNN, JJ., concur; WILLIAMS, J., not participating.

BUTLER v. COREY.

No. 2425. Opinion Filed February 11, 1913.

(130 Pac. 137.)

1. **LANDLORD AND TENANT—Lien on Crops—Liability of Purchaser.** A landlord entitled to rent may recover from the purchaser of any crop grown by the tenant, who has notice, either actual or constructive, of the lien, the value of the crop purchased, to the extent of the rent due.
2. **PRINCIPAL AND AGENT—Wrongful Act—Liability of Agent.** An agent, who converts the property of a third person, is liable for such conversion; and it is no defense that his acts were committed in pursuance of his employment and for the benefit of his principal.

(Syllabus by the Court.)

Error from Caddo County Court;
B. F. Holding, Judge.

Action by Earnest C. Corey against Roy Butler. Judgment for plaintiff, and defendant brings error. Affirmed.

Ballinger & Maxwell, for plaintiff in error.

Pruett & Livesay, for defendant in error.

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DUNN, J. This case presents error from the county court of Caddo county, and is an action brought by E. C. Corey, as plaintiff, against the plaintiff in error, as defendant, to recover the value of certain broom corn, which, it is alleged, he converted, upon which plaintiff had a lien for rent. At the conclusion of the evidence the court instructed the jury to return a verdict for plaintiff, which was accordingly done, on which judgment was rendered. From the denial of a motion for a new trial, defendant has appealed to this court.

While counsel for defendant present and argue a number of propositions, in our judgment, in view of the undisputed evidence and the law applicable thereto, there is no merit therein. The record discloses that a man named Hatton was a tenant on land owned by Corey; that he raised a crop of broom corn thereon in 1908; that Corey had a lien thereon for his rent, and that Butler had both actual and constructive notice thereof; that in the face of these facts he purchased the broom corn.

Section 4100, Comp. Laws 1909, provides:

"The person entitled to rent may recover from the purchaser of the crop, or any part thereof, with notice of the lien, the value of the crop purchased, to the extent of the rent due and damages."

A similar statute to this has been construed by the Supreme Court of the state of Kansas in a number of cases, among which may be noted the following: *Scully v. Porter*, 57 Kan. 322, 46 Pac. 313; *Maelzer v. Swan*, 75 Kan. 496, 89 Pac. 1037; *Mangum v. Stadel*, 76 Kan. 764, 92 Pac. 1093—all of which hold, in substance, that the purchaser of a crop, with notice of the lien, either actual or constructive, does so with liability to the landlord in the amount of its value for whatever may be due for rent.

Nor did the court commit error in denying defendant the right of proving that he was purchasing the crop merely as an agent, for the reason that an agent or servant, who converts the property of a third person, is liable in trover for such conversion; and it is no defense that his acts were committed in pursuance of his employment and for the benefit of his principal or

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master. See 28 Am. & Eng. Ency. of Law, p. 688, and cases cited.

The judgment of the trial court is accordingly affirmed.

All the Justices concur.

BROCHERS v. NICKEL.

No. 2433. Opinion Filed February 11, 1913.

(130 Pac. 138.)

AUCTIONS AND AUCTIONEERS—Sales—Title of Purchaser. Where, at the public sale of A.'s goods, with the knowledge and consent of all concerned, B.'s goods are knocked down and sold to the highest bidder, and where, in compliance with the terms of the sale, a note and mortgage evidencing the indebtedness and securing the purchase price is executed by the purchaser, payable to A., and delivered to and accepted by him, held, that thereupon title and right of possession to the property passed to the purchaser.

(Syllabus by the Court.)

Error from Washita County Court;

L. R. Shean, Judge.

Action by C. H. Nickel against C. A. Brochers. Judgment for plaintiff, and defendant brings error. Affirmed.

Massingale & Duff, for plaintiff in error.

Brett & Rice, for defendant in error.

PER CURIAM. This is an action in replevin brought by C. H. Nickel, defendant in error, against C. A. Brochers, plaintiff in error, to recover a binder of the value of \$10. There was judgment for plaintiff before the justice, and again on trial anew in the county court of Washita county, and defendant brings the case here.

The court did not err in refusing to instruct the jury at the close of the testimony, to return a verdict for defendant. The evidence discloses that, prior to the suit, one Fitzler had had a public sale in that county of certain of his personal property to

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the highest bidder, the terms of which were that all sums of \$10 or under owing by the successful bidder were to be paid in cash, and on all over that amount a credit of eight or ten months was to be extended, with interest, after the instrument evidencing the indebtedness became due; that, known to all concerned, defendant brought this binder there, to be sold with the other property under the terms of the sale; that, plaintiff being the highest bidder, the same was knocked down to him for \$10, whereupon, his purchases exceeding that amount, pursuant to the terms of the sale, he executed and delivered to Fitzler a note and mortgage for that amount, payable to Fitzler, prepared for plaintiff's signature by the clerk of the sale, and then left for town a short distance away; that, although defendant demurred to accepting anything but cash for his binder, on the return of plaintiff that same evening, at the instance of defendant, a slight correction was made in the note in the hands of Fitzler, whereupon both plaintiff and defendant departed for their respective homes, leaving the binder at the place of sale, to be sent for by plaintiff: that on a subsequent day, upon Fitzler refusing to indorse the note to him, defendant repossessed himself of the binder, and, refusing to surrender same to plaintiff on demand, this suit was brought. Upon the execution and delivery by plaintiff to Fitzler of the note and mortgage, in compliance with the terms of the sale, title and right of possession to the binder passed to the purchaser.

Affirmed.

Robinson v. City of Perry.

ROBINSON v. CITY OF PERRY.

No. 2774. Opinion Filed February 11, 1913.

(130 Pac. 276.)

MUNICIPAL CORPORATIONS—Payment of Laborers—“Emergency” —Eight-Hour Day. The proviso contained in section 4057, Comp. Laws 1909 (Act March 22, 1909 [Laws 1909, c. 39, art. 4]), is an “emergency” measure; and it is not contemplated thereby that a man employed by a city as an engineer at its waterworks plant should recover for extra time over eight hours provided for therein, where the same is devoted by him to performance of his ordinary and usual duties.

(Syllabus by the Court.)

*Error from Noble County Court;**L. B. Robinson, Judge.*

Action by Harry M. Robinson against the City of Perry. Judgment for defendant, and plaintiff brings error. Affirmed.

Chas. R. Bostick, for defendant in error.

George G. Graham, for plaintiff in error.

DUNN, J. This case presents error from the county court of Noble county. From the petition and evidence it appears plaintiff in error was employed as an engineer at the waterworks plant of the city of Perry, his service beginning on the 1st day of June, 1910; that during the period of his said employment, by reason of the fact that no one was provided to relieve him, he was compelled to remain and render service for twelve hours each day, instead of eight hours, as provided for by section 4057, Comp. Laws 1909 (Act March 22, 1909 [Laws 1909, c. 39, art. 4]); that on leaving the employ of the city he presented his verified claim to the city council for the amount due him for the time served in excess of eight hours per day, which was by the council rejected, and recovery was denied in an action therefor in the county court. The case has been prosecuted to this court to secure a review of the judgment rendered.

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The statutes involved (sections 4057, 4058, Comp. Laws 1909) read as follows:

"Section 4057. Eight hours shall constitute a day's work for all laborers, workmen, mechanics, prison guards, janitors of public institutions, or other persons now employed or who may hereafter be employed by or on behalf of the state of Oklahoma, or by or on behalf of any county, city, township or other municipality of this state, except in cases of extraordinary emergency which may arise in time of war, or in cases where it may be necessary to work more than eight hours per calendar day for the protection of property or human life: Provided, that in all such cases the laborers, workmen, mechanics or other persons so employed and working to exceed eight hours per calendar day shall be paid on the basis of eight hours constituting a day's work: Provided, further, that not less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers, workmen, mechanics, prison guards, janitors in public institutions, or other persons so employed, by or on behalf of the state of Oklahoma, or any county, city, township, or other municipality of said state; and laborers, workmen, mechanics, or other persons employed by contractors or subcontractors in the execution of any contract or contracts within the state of Oklahoma, or within any county, city, township, or other municipality thereof, shall be deemed to be employed by or on behalf of the state of Oklahoma, or of such county, city, township, or other municipality thereof.

"Sec. 4058. All contracts hereafter made by or on behalf of the state of Oklahoma, or by or on behalf of any county, city, township, or other municipality of said state, with any corporation, person or persons, for the performance of any public work, by or on behalf of the state of Oklahoma, or any county, city, township, or other municipality, shall be deemed and considered as made upon the basis of eight hours constituting a day's work; and it shall be unlawful for such corporation, person or persons, to require, aid, abet,, assist, connive at, or permit any laborer, workman, mechanic, prison guards, janitors in public institutions, or other person to work more than eight hours per calendar day in doing such work, except in cases and upon the conditions provided in section one of this act (4057)."

From the foregoing statement it will be seen that the construction of these statutes and their application to the plaintiff and the employment in which he was engaged is all that is presented to this court. The rights and remedies involved are purely

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statutory. Whatever relief plaintiff may be entitled to must be found within the written letter of the law, or be so clearly implied thereby that by construction the court could say that it was contained therein. For a violation of the act in other cases than where it was due to an extraordinary emergency, or for the protection of property or human life, the same is made a misdemeanor; and wherever employees are engaged for an excess of time in the excepted instances they are entitled to increased pay. That the employment in this case was not induced because of any extraordinary emergency occasioned by war is certain, nor is any claim made thereon; but it is contended that the work in which plaintiff was engaged for more than eight hours was for the protection of human life and property, and that it was lawful for him to be employed for that period of time, and he was entitled to remuneration therefor. Such a holding would involve a construction that engineers and other employees in and around waterworks plants, which are required to be ready for service at all hours of the day and night, were without the operation of this act. There is nothing in the act to support such a construction. The Legislature intended to punish employing public officers of the municipalities mentioned for compelling employees to work more than eight hours in the performance of their ordinary duties, and considered this penal provision to be sufficient; and that a right to pay for extra time arose when, for some reason beyond the control of the municipality, it was necessary, to protect life or property, to retain an employee for longer than the statutory period. Such cases would arise where an engineer, whose duty it was to relieve plaintiff after his regular eight hours of work had expired, should get hurt or sick, or quit without adequate notice, so that another might be procured, or that the plaintiff, in the event of a breakdown of its plant, might operate the same while it was being repaired. The proviso is to cover an emergency, and not contemplated to be called into exercise in the pursuit of a municipal employee's ordinary and usual duties.

From the view which we take of the act, therefore, the judgment of the trial court is affirmed.

All the Justices concur.

Manuel v. Smith et vir.

MANUEL v. SMITH *et vir.*

No. 3314. Opinion Filed February 11, 1913.

INDIANS—Lands—Homestead—Alienation. P., a freedman member of the Creek Tribe of Indians who had selected an allotment, died in the month of June, 1902. On March 26, 1904, there were delivered to his heirs two deeds for his said allotment, denominating portions of it as homestead and surplus. On September 13, 1905, the mother, as heir of the said decedent, executed a deed to the said allotment, homestead and surplus. **Held**, that the homestead character never attached to any portion of the said allotment, and under and by virtue of the terms of the act of April 21, 1904 (33 St. at L. 189), the restrictions, if any existed, were removed for its alienation by the heirs of the deceased. (Syllabus by the Court.)

*Error from District Court, Okmulgee County;
Wade S. Stanfield, Judge.*

Action by Malinda Manuel against Ada Smith and James C. Smith. Judgment for defendants, and plaintiff brings error. Affirmed.

N. B. Maxey, John B. Campbell, and W'm. O. Beall, for plaintiff in error.

Owen & Stone, for defendants in error.

DUNN, J. This case presents error from the district court of Okmulgee county. Malinda Manuel, as plaintiff, brought her action against Ada Smith and James C. Smith, as defendants, to cancel certain deeds and for an accounting. Counsel for plaintiff in error state that the case was submitted to the court below on an agreed statement of facts setting up substantially the following: That the lands in suit were lands allotted to Clyde Perryman, who was a freedman member of the Creek Tribe of Indians and who died in the month of June, 1902; that he was the son of plaintiff herein, who, on September 13, 1905, executed a deed to Ada Smith, the consideration named being \$600; that the plaintiff offered to return the money with interest and prayed that an accounting be had, and that she be allowed reasonable

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rents and profits for the time which the defendants had possession of the land. The contention is made that the deed was executed for an inadequate and unconscionable consideration and in violation of the express provisions of the Original and Supplemental Creek Agreements, and was void. It is further contended that it was void in so far as it affected the homestead allotment, and being void in part, was void *in toto*.

The only question really presented by the agreed statement of facts, and argued and briefed, is the one relating to the right of plaintiff to alienate the land, homestead and surplus, on September 13, 1905, and this question, on the authority of *Parkinson v. Skelton*, 33 Okla. 813, 128 Pac. 131, *Rentie v. McCoy*, ante, 128 Pac. 244, *Hawkins v. Oklahoma Oil Co. et al.* (195 Fed. 345), an opinion of the Circuit Court of the United States for the Eastern District of Oklahoma, filed December 28, 1911, and *United States v. Jacobs* (195 Fed. 707), an opinion of the United States Circuit Court of Appeals of the Eighth Circuit, must be decided in accordance with the judgment rendered by the trial court. The opinions in those cases holding, in effect, that the homestead character did not attach to any portion of this land, notwithstanding the fact that one of the deeds issued nominated a portion of it as such, and that if any restrictions existed, they had been removed in 1905 by the act of April 21, 1904 (33 St. at L. 189), and the heirs had the right to alienate.

The judgment of the trial court is therefore affirmed.

TURNER, J., concurs; KANE, J., concurs in the conclusion; HAYES, C. J., and WILLIAMS, J., absent, and not participating.

MEYER *et al.* v. LYNDE-BOWMAN-DARBY CO. *et al.*

No. 2756. Opinion Filed February 18, 1913.

(130 Pac. 548.)

1. **TAXATION—Levy—Specification of Purpose.** Section 19, article 10, of the Constitution (Williams' Ann. Const., sec. 284), which requires that every act of the Legislature levying a tax shall specify distinctly the purpose for which the tax is levied, is mandatory, and an act levying an annually recurring tax, which does not specify the purpose for which the tax is levied, is void.
2. **SAME—Validity of Statute—Graduated Land Tax.** The act of May 26, 1908 (Sess. Laws 1907-08, p. 725; Comp. Laws 1909, sec. 7738-7742), providing for a graduated tax on land holdings, is in conflict with section 19, article 10 of the Constitution, because it fails to specify the purpose for which the tax is levied.

(Syllabus by the Court.)

Error from District Court, Muskogee County;
R. F. deGraffenreid, Judge.

Action by Lynde-Bowman-Darby Company and others against Leo Meyer, as State Auditor, and the County Clerk and County Treasurer of Muskogee county, to restrain them from levying and collecting the so-called graduated land tax. Judgment for plaintiffs, and defendants bring error. Affirmed.

Chas. West, Atty. Gen., for plaintiffs in error.

N. A. Gibson and Preston C. West, for defendants in error.

S. T. Bledsoe, amicus curiae.

AMES, Special J. The question involved in this case is the validity of the act of May 26, 1908, entitled, "An act to provide for a graduated tax on land holdings in excess of six hundred forty acres of average taxable lands, and a graduated tax upon the incomes, rents, and profits of lands held by lease or rental contract in excess of six hundred and forty acres, and providing procedure for collection thereof." (Sess. Laws 1907-08, p. 725). Many objections are raised to the act, and are argued elaborately

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at the bar, but we find it necessary to pass on only one: Is the act in conflict with section 19, article 10, of the Constitution (Williams' Ann. Const., sec. 284)? That section is as follows:

"Every act enacted by the Legislature, and every ordinance and resolution passed by any county, city, town, or municipal board or local legislative body, levying a tax, shall specify distinctly the purpose for which said tax is levied, and no tax levied and collected for one purpose shall ever be devoted to another."

The act under consideration does not specify distinctly, or otherwise, the purpose for which the tax is levied. The only language in the act which is referred to as approximately so stating, is that portion of section 2 reading as follows:

"All persons owning land in this state of taxable value equivalent to six hundred and forty acres of average taxable value, or less, shall pay the same *ad valorem* tax rate as is levied and charged for all purposes of government against personal or other property in this state. * * *"

It is argued that, pursuant to this language, the graduated tax is levied "for all purposes of government," but it is manifest from reading the language that the phrase, "for all purposes of government," does not specify the purpose for which the graduated tax is levied, but is merely descriptive of the rate charged against personal or other property. This section of the Constitution is mandatory, and the failure of the act to specify the purpose for which the tax is levied is fatal. *Commonwealth v. U. S. F. & G. Co.*, 121 Ky. 409, 89 S. W. 251; *C. O. & S. W. R. Co. v. Commonwealth*, 33 Ky. L. Rep. 882, 111 S. W. 334; *Southern Ry. Co. v. Hamblen County*, 115 Tenn. 526, 92 S. W. 238.

We are not concerned with the policy or the wisdom of this constitutional requirement. It is sufficient for us that the Constitution so declares. It is apparent, however, that as taxes are paid by the people, they have required the Legislature, as well as other political subdivisions, in levying a tax which they are to pay, to inform them by the act of the purpose for which they are to pay the tax, and in the absence of this information they have a right to refuse payment. The people who are called upon to pay this tax have no idea why they are thus taxed. They have no idea for what purpose the tax they pay will be applied,

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and by their Constitution they have reserved the right to refuse to pay a tax, unless they are informed of its purpose.

But it is argued that, under the decision of this court, in *McGannon v. State*, 33 Okla. 145, 124 Pac. 1063, it is unnecessary for an act levying a tax of this nature to specify the purpose for which it is levied. The McGannon case does not so hold. That case involved the inheritance tax. An inheritance tax is only levied once, and the court held that this section of the Constitution did not apply for that reason, but applied only to annually recurring taxes. The tax in the case at bar is an annual tax, and therefore does not come within the reason or the language of the McGannon case.

What we have said disposes of the case, and it is unnecessary for us to consider the other questions involved.

The judgment of the trial court is affirmed.

HAYES, C. J., and KANE, DUNN, and TURNER, JJ., concur. WILLIAMS, J., being disqualified, C. B. AMES, a member of the Supreme Court Commission, was appointed to sit in his stead.

HUGHES v. CHICAGO, R. I. & P. RY. CO.

No. 3349. Opinion Filed February 18, 1913.

(130 Pac. 591.)

1. **APPEAL AND ERROR—Review—New Trial—Discretion of Trial Court.** Trial courts are invested with a very large and extended discretion in the granting of new trials, and new trials ought to be granted whenever, in the opinion of the trial court, the party asking for the new trial has not probably had a reasonably fair trial, and has not in all probability obtained or received substantial justice, although it might be difficult in many instances for the trial court or the parties to state the grounds for such new trial upon paper so plainly that the Supreme Court could understand them as well as the trial court and the parties themselves understood them. (Following *Trower v. Roberts*, 17 Okla. 641, 89 Pac. 1113.)
2. **SAME—Grant of New Trial.** At the request of the plaintiff in error, over the objection and exception of the defendant in error, the following instruction was given:
“You are instructed that the proximate cause or causes, of any injury is that efficient and moving cause or causes, with-

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out which cause or causes, the injury would not have happened. And, in this case, if you find from the evidence before you that the plaintiff's injuries, if you find that he was injured, was the proximate result of the negligence of the defendant in permitting these fire grates to become and remain defective, or that his injuries were the result of a condition brought about by a combination of both of said alleged causes, then you should find for the plaintiff."

The defendant in error requested the following instruction, which was refused and exception saved:

"You are instructed that, although you may believe from the evidence that the injury complained of was occasioned by the act of the defendant, still, if you further believe from the evidence that such injury was not the natural result of the acts of the defendant, and could not have been foreseen, or reasonably expected to result from the conduct of the defendant, then the defendant would not be liable."

A verdict having been returned in favor of the plaintiff in error, a motion for a new trial was, in due time, presented and sustained by the trial court, on the ground that the instruction given did not sufficiently apply the definition of "proximate cause." **Held**, that the action of the trial court in granting a new trial did not constitute reversible error.

(Syllabus by the Court.)

*Error from Superior Court, Pottawatomie County;
Geo. C. Abernathy, Judge.*

Action by J. L. Hughes against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff. From order of the court granting a new trial, plaintiff brings error. Affirmed.

H. H. Smith and W. T. Williams, for plaintiff in error.

C. O. Blake, H. B. Low, R. J. Roberts, and W. H. Moore, for defendant in error.

WILLIAMS, J. This proceeding in error seeks to have reviewed the action of the trial court in sustaining a motion by the defendant in error for a new trial.

Instruction number 9, given at the request of the plaintiff (plaintiff in error), is as follows:

"You are instructed that the proximate cause or causes, of an injury is that efficient and moving cause or causes, without which cause or causes, the injury would not have happened. And in this case, if you find from the evidence before you that the

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plaintiff's injuries, if you find that he was injured, was the proximate result of the negligence of the defendant in permitting these fire grates to become and remain defective, or that his injuries were the result of a condition brought about by a combination of both of said alleged causes, then you should find for the plaintiff."

The defendant (defendant in error) excepted to the giving of this instruction, and requested the following instruction, which was refused, exceptions being saved:

"You are instructed that, although you may believe from the evidence that the injury complained of was occasioned by the act of the defendant, still, if you further believe from the evidence that such injury was not the natural result of the acts of the defendant, and could not have been foreseen, or reasonably expected to result from the conduct of the defendant, then the defendant would not be liable."

The trial court, in passing on the motion for a new trial, held this instruction (given) improper: (1) for the reason that it invades the province of the jury; (2) that it does not apply the definition of "proximate cause," and it does not state the proper rule for determining the liability of the defendant—quoting from *Thomp. on Neg.*, sec. 50, vol. 1, as follows:

"The law does not impute negligence to an injury that could not have been foreseen or reasonably anticipated, as the probable result of a given act or omission. It follows that the negligence of a person cannot be the proximate cause of a harm to another following it, unless, under all the attending circumstances, ordinary prudence would have admonished the person sought to be charged with the negligence that his act or omission would probably result in injury to some one. The greatest test as to whether negligence is the proximate cause of an accident is said to be whether it is such that a person of ordinary intelligence should have foreseen that an accident was liable to be produced thereby."

In *Solts v. Southwestern Cotton Oil Co.*, 28 Okla. 706, 115 Pac. 776, it is said:

"* * * The burden is on plaintiff to prove negligence; to convict the master of negligence, plaintiff must not only prove the injury, but must go further and prove that the failure of the master to use the cover as used the previous season was the proximate cause of his injury, and that the master, by the exercise

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of such care and foresight as a man of ordinary prudence should have exercised under like circumstances, should have reasonably anticipated that his failure so to do would result in plaintiff being injured as he was. Coupled with proof of the physical fact of injury, proof of the latter is indispensable to a recovery, for the reason that the master is entitled to the presumption that he has done his duty, and therefore not negligent, and further proof is necessary to overcome this presumption."

In *C., R. I. & P. Ry. Co. v. Ashlock* (not yet officially reported), 129 Pac. 726, by Brewer, C., it is said:

"This reduces the whole matter to the single question of 'proximate cause.' This question was for the jury, if there was any evidence, or inferences to be legitimately drawn from the evidence, viewed in the light of the situation and circumstances of the parties and the work, tending to show that defendant's failure to perform its duty produced the injury, and that such a result might have been reasonably anticipated."

In *C., R. I. & P. Ry. Co. v. Beatty*, 27 Okla. 844, 116 Pac. 171, it is said:

"The correct rule seems to be that a person guilty of negligence or an omission of duty should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact exist, whether they could have been ascertained by reasonable diligence or not, would have thought at the time of the negligent act as reasonably possible to follow, if they had been suggested to his mind. *Shearman & Redfield on Negligence* (4th Ed.), sec. 29. The weight of authority seems to be that a party is liable only for such extension of a fire, negligently kindled by him, as a prudent person would have regarded as reasonably possible under the state of wind and weather existing at the time of the fire. *Shearman & Redfield on Negligence* (4th Ed.), sec. 666."

In *Stephens et al. v. Oklahoma City Ry. Co.*, 28 Okla. 340, 114 Pac. 611, it is said:

"* * * But we are of the opinion that in the instant case, at least, the rule invoked is subject to the limitation pointed in *Clark v. Chambers*, 3 Q. B. Div. 327, 7 Cent. L. J. 11, that the intervening agency must have been one which the first actor was bound to anticipate. The rule seems to be that where the negligent act causes consequences such as is in the ordinary course of things were likely to arise, and which might, therefore, reasonably be expected to arise, or which it was contemplated by

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the parties must arise, liability follows; otherwise not. *Clark v. Chambers, supra*. In *Sharp v. Powell*, 20 W. R. 584, L. R. 7, C. P. 253, one of the cases cited by Cockrum, C. J., in *Clark v. Chambers*, it was held that 'the action would not lie where the injury, though arising from the unlawful act of the defendant, could not have been reasonably expected to follow from it.' In that case Lord Chief Justice Bovill says: 'No doubt one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom; but, generally speaking, he is not liable for damage which is not the natural or ordinary consequences of such an act, unless it be shown that he knows, or has reasonable means of knowing, that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person. Where there is no reason to expect it, and no knowledge in the person doing the wrongful act that such a state of things exists as to render the damage probable, if injury does result to a third person, it is generally considered that the wrongful act is not the proximate cause of the injury so as to render the wrongdoer liable to an action.'

"Mr. Justice Strong, discussing this question in *Milwaukee & St. P. Ry. Co. v. Kellog*, 94 U. S. 469, 24 L. Ed. 256; said: 'But it is generally held that, in order to warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.'

"Even the severe rule of care and diligence which the law imposes upon carriers of passengers does not extend so far as to make one liable for an injury to a passenger from an accident which is not the reasonable, natural, and probable result of the situation, and which could not have been foreseen by the carrier in the exercise of that degree of care which the law demands of him. 3 Thompson's Commentaries on the Law of Negligence, sec. 2778. The reason of the rule is that the law holds a person liable for those consequences only which were the natural and probable result of his negligence, and which therefore ought to have been foreseen and anticipated."

In view of the instruction given at the request of plaintiff (plaintiff in error), the refusal of said instruction asked by the defendant (defendant in error) to be given was error. *St. Louis & S. F. R. Co. v. Crowell*, 33 Okla. 773, 127 Pac. 1063.

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In *Trower v. Roberts*, 17 Okla. 641, 89 Pac. 1113, it is said:

"Now, if the action of the court upon either of these two motions was correct, this case must be affirmed. And we take the rule to be well established that trial courts are invested with a very large and extended discretion in the granting of new trials, and new trials ought to be granted whenever in the opinion of the trial court the party asking for the new trial has not in all probability had a reasonably fair trial, and has not in all probability obtained or received substantial justice, although it might be difficult for the trial court, or the parties, to state the grounds for such new trial upon paper so plainly that the Supreme Court could understand them as well as the trial court and the parties themselves understood them. The Supreme Court will not reverse the order of the trial court granting a new trial, unless said court can see beyond all reasonable doubt that the trial court has manifestly and materially erred with respect to some simple, pure, and unmixed question of law, and that, except for such error, the ruling of the trial court would not have been made as it was so made, and that it ought not to have been so made. As the granting of a new trial simply places the parties in a position to have the issues between them again submitted to a jury or the court, the showing for reversal should be much stronger where the error assigned is the granting of a new trial than where it is the refusal of it. *City of Sedan v. Susan B. Church*, 29 Kan. 137."

In *Hogan et al. v. Bailey*, 27 Okla. 15, 110 Pac. 890, it is said:

"The trial court has a higher function under our jurisprudence than to act merely as a moderator or umpire between contending adversaries before a jury. Not only is it charged with the duty of seeing that the course and conduct of the trial gives to each of the litigants a fair opportunity to present his cause and to have the facts weighed in the light of proper instructions declaring the law relative thereto, but it is the imperative, abiding duty of the court, after the jury has returned its verdict and awarded to one or the other success in the controversy, where the justness of the same is challenged as in this case, to carefully weigh the entire matter, and, unless it is satisfied that the verdict is responsive to the demands of justice, to set the verdict aside and grant a new trial. Not only must the jury be satisfied of the righteousness of the conclusion to which it arrives, but, unless that conclusion meets the affirmative, considerate approval of the

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mind and conscience of the court, it should not, where challenged, be permitted to stand."

See, also, *Citizens' State Bank of Lawton v. Chattanooga State Bank et al.*, 23 Okla. 767, 101 Pac. 1118; *Davis v. Stilwell*, 32 Okla. 757, 124 Pac. 74; *Jameson v. Classen Co.*, 33 Okla. 77, 124 Pac. 67; *Ardmore Lodge No. 9, I. O. O. F., v. Dawson*, 33 Okla. 37, 124 Pac. 66; *Stapleton v. O'Hara*, 33 Okla. 79, 124 Pac. 55; *Chapman v. Mason*, 30 Okla. 500, 120 Pac. 250; *National R. & B. Supply Co. v. Elsing*, 29 Okla. 334, 116 Pac. 790; *Jacobs v. City of Perry*, 29 Okla. 743, 119 Pac. 243; *Exchange Bank of Wewoka et al. v. Bailey*, 29 Okla. 246, 116 Pac. 812; *Hobbs v. Smith et al.*, 27 Okla. 830; *Duncan v. McAlester-Chotaw Coal Co.*, 27 Okla. 427, 112 Pac. 982.

Under the foregoing authorities it is not essential to determine whether the error committed in refusing said instruction could work a reversal on review in this court, had the trial court overruled the motion for a new trial.

Not being justified in holding that the court abused its discretion in awarding a new trial, under this record and said authorities, it is our duty to affirm its action in awarding a new trial.

The other grounds upon which it sustained the motion for a new trial not being likely to arise upon another trial, the same are not passed upon.

The judgment of the lower court is affirmed.

All the Justices concur.

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LONG v. SHEPARD.

No. 1878. Opinion Filed January 17, 1913.

Rehearing Denied February 25, 1913.

(130 Pac. 131.)

1. **PLEADING—Exhibits—Effect.** It is not good practice, unless so required by statute, to make a mere exhibit a part of the petition.
(a) It is better to make a direct statement of the facts in the order in which they occur; this being the orderly method a good pleader will observe.
(b) However, when an exhibit is made a part of the petition, although not required by statute, and the other allegations in said petition, when taken in connection with the contents of the exhibit, state a cause of action, reference may be had to such exhibit, in order to determine whether a cause of action has been stated to such an extent as to withstand a general demurrer.
(c) Though an instrument may not be required by statute to be attached as an exhibit, yet if it is attached as a part thereof, and its execution is alleged in the petition, and its substance therein pleaded, so far as necessary and applicable to the cause of action sued on, and its execution is not denied under oath, on the trial its execution will be taken as admitted.
2. **SAME—Motions—Judgment on Pleading.** When, under the allegations of the petition and the admissions in the answer, the plaintiff is entitled to judgment on the pleadings, it is error to deny a motion for such purpose.
3. **SAME.** When, under the pleadings, it is averred that L., by a clause in a deed executed prior to Act of April 26, 1906, c. 1876, sec. 19, 34 U. S. St. at L. 144, and before the restrictions were removed from the allotment of the grantor, it was stipulated that said grantor agreed "to execute a good and sufficient deed of conveyance to said defendant for said eighty acres of land when his restrictions upon the power to alienate said land were removed," and said written contract is attached to the petition as a part thereof, and its execution is not denied, and it is further averred that after removal of restrictions said L. executed to S. a deed to said 80 acres of land, pursuant to said stipulation, said deed, as to said 80 acres of land, is void; and judgment to that extent should have been entered on the pleadings, upon motion, in favor of L.

(Syllabus by the Court.)

Error from District Court, Hughes County;
John Caruthers, Judge.

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Action by Daniel A. Long against John E. Shepard. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with directions.

C. Dale Wolfe and *Wilmott & Wilhoit*, for plaintiff in error.

Rogers & Harris and *Crump, Skinner & Bailey*, for defendant in error.

WILLIAMS, J. This proceeding in error is to review a judgment of the lower court, wherein the plaintiff in error, Daniel A. Long, as plaintiff or complainant, filed a bill or petition against the defendant in error, John E. Shepard, as defendant or respondent, praying for the cancellation of a deed to 120 acres of land, covering a part of the allotment of said plaintiff, on the ground (1) that the same was obtained by fraud, and (2) that it was executed and obtained in violation of section 19 of Act of Congress of April 26, 1906, c. 1876, 34 U. S. St. at L. 144, which is as follows:

"And every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be, and the same is hereby, declared void."

In the bill or petition filed by plaintiff on March 17, 1909, he alleges that he is a citizen of the Creek Nation, and, as such, had allotted to him said land; that on April 26, 1905, being seised in fee simple of said tract of land, he executed and delivered a warranty deed (which he attached as an exhibit), covering 80 acres of said tract, to defendant, agreeing by the terms of said deed "to execute a good and sufficient deed of conveyance to said defendant for said eighty acres of land when his restrictions upon the power to alienate said land were removed," this being prior to the date of the removal of his restrictions; that on August 1, 1907, said plaintiff executed and delivered to said defendant another deed of conveyance for said 80 acres of land, the plaintiff renewing "the understanding and agreement that the plaintiff would make, execute and deliver to defendant a good and valid deed of conveyance for said eighty acres of land as formerly agreed;" that on August 9, 1907, he executed another deed to said defendant, covering said 80 acres of land and also the other

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40 of said 120 acres, but the same was done under false representations, such as constituted fraud, etc., and such as to avoid said conveyance as to said 40 acres of land.

It is further specifically averred in said bill as follows:

"That before the removal of restrictions upon the alienation of any of the land described and included in said deed, * * * the defendant made and entered into a contract and agreement with the plaintiff for the making and execution of a deed to said 80 acres of land herein described as the east half of plaintiff's allotment, and included in said fraudulent deed of August 9, 1907, as soon as the restrictions upon the alienation thereof were removed; that in pursuance of said contract and agreement, on the 9th day of August, 1907, the defendant procured and received from plaintiff, and plaintiff made and executed to the defendant, a deed for said 80 acres of land, which deed is absolutely void. That, should this court so require, this plaintiff hereby offers, and is ready and willing, to do equity by making, executing, and delivering a good and valid deed to defendant for said 80 acres of land according to the contract and agreement between the parties herein referred to, and hereby offers and tenders such deed; that defendant contracted and agreed to pay the sum of thirteen hundred dollars (\$1,300.00) to plaintiff for said 80 acres of land; that eight hundred and sixty dollars (\$860.00) thereof has been paid, and the sum of four hundred and forty dollars (\$440.00) is the balance of the unpaid purchase price, which sum is due and wholly unpaid. Wherefore, plaintiff prays judgment for the cancellation of said deed of the 9th day of August, 1907; * * * that the same be delivered up, canceled and declared null and void and of no effect, and that the record of said land in the office of the register of deeds be purged, cleared, and discharged of said fraudulent conveyance and deed; but, if for any reason said deed cannot be canceled, in its entirety, then that it be canceled and be held null and void and of no effect as to the additional 40 acres of land herein described as fraudulently procured and included in said void deed; that plaintiff be adjudged to be the absolute owner in fee simple of said 40 acres of land, and that the defendant be required to deliver up possession of the same, with damages for the unlawful detention, use, and possession thereof in the amount of \$3 per acre per annum from the 1st day of January, 1908, and for all damages for injury to said freehold or estate; that, if plaintiff be required to reconvey said 80 acres of land to defendant, said plaintiff be given judgment against defendant in the sum of \$440, with interest thereon at the rate of 6 per cent. per annum from the 9th

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day of August, 1907, until paid, and that the same, together with all damages for the use, possession, unlawful detention, and injury to said 40 acres of land, above described, be declared a lien on said 80 acres of land until paid; for all costs of this action, and all other proper relief, both at law and in equity, which this plaintiff may be entitled to."

Defendant answered by general denial and also averred:

"That long prior to the 9th of August, 1907, he had loaned and furnished plaintiff large sums of money, and that plaintiff had agreed that when the restrictions were off his land, and he could make a good title, that he would convey to this defendant fee-simple title to his surplus allotment in the Creek Nation; that on the 9th day of August, 1907, said plaintiff, by his warranty deed of that date, conveyed to the defendant herein by his warranty deed; * * * that the plaintiff understood fully at the time of the execution of the deed that he was selling 120 acres of land, and that the consideration was on that date, or soon thereafter, paid in full; that the plaintiff, on the 9th day of August, 1907, and at all times thereafter, understood that he had sold 120 acres of his land, and made no complaint as to the transaction until about the time of the filing of this suit."

Defendant's answer was not verified.

The deed alleged to have been executed on the 1st day of August, 1907, was averred to be in the possession of defendant, and for that reason a copy was not attached. From the pleading it appears that the deed of August 9, 1907, was made by virtue of a written stipulation, contract, or agreement entered into before the removal of restrictions.

Plaintiff moved for judgment on the pleadings, which was denied. The court's action is now before this court for review.

It is not good practice to make a mere exhibit a part of the petition; it being better to make a direct statement of the facts in the order in which they occur. This is the orderly method which a good pleader will observe. Where, however, an exhibit is made a part of the petition, and the other allegations therein, taken in connection with the contents of such exhibit, state a cause of action, reference may be had to such exhibit for such purpose, as against a general demurrer. *Whiteacre v. Nichols*, 17 Okla. 387, 87 Pac. 865; *Grimes v. Cullison*, 3 Okla. 268, 41 Pac. 355; *Wey et al. v. Bank of Hobart*, 29 Okla. 313.

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116 Pac. 943; *Pefley v. Johnson*, 30 Neb. 529, 46 N. W. 710; *Emeric v. Tams*, 6 Cal. 156; *Whitby v. Rowell*, 82 Cal. 635, 23 Pac. 40, 382; *Savings Bank of San Diego County v. Burns*, 104 Cal. 473, 38 Pac. 102; *Hays et al. v. Dennis*, 11 Wash. 360, 39 Pac. 658. This ruling agrees with the liberal code procedure, which was devised to do away with technical defenses.

The question now arises as to whether an answer setting up a general denial is sufficient to put in issue the execution, as well as the validity, of the deeds attached as exhibits to plaintiff's bill or petition, without said answer having been verified.

Every pleading in a court of record must be subscribed by the party or his attorney. Section 5647, Comp. Laws 1909; section 3985, St. Okla. 1893. In all actions allegations of the execution of written instruments, and indorsements thereon, of the existence of a corporation or partnership, or of any appointment of authority, or the correctness of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true, unless the denial of the same be verified by the affidavit of the party, his agent or attorney. Section 5648, Comp. Laws 1909; section 3986, St. Okla. 1893.

Though such instrument may not be required by the statute to be attached as an exhibit, yet, if execution is alleged in the petition, and the substance of it stated therein, so far as necessary and applicable to the cause of action, and its execution was not denied under oath on the trial, its execution will be taken as admitted.

In this case the allegation of the execution of the instrument, as to the deed, to wit, April 26, 1905, is made in the petition. The matters relative to the clause therein contained, as to the agreement or stipulation to execute a good and sufficient deed of conveyance to said defendant for 80 acres of land when his restrictions upon his power to alienate said land were removed, are well pleaded in the petition. Likewise the allegation of the execution of the deed of August 1, 1907, and the allegation of the agreement are sufficiently pleaded in the petition. *St. Louis & S. F. R. Co. v. Cake*, 25 Okla. 227.

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The judgment of the lower court is remanded, with instructions to enter judgment in favor of the plaintiff in error for the cancellation of the deed of August 9, 1907, as to said 80 acres of land that were covered by the deed of April 26, 1905, but in favor of the defendant in error as to the other 40 acres of land contained in said deed of August 9, 1907.

All the Justices concur.

In re BONDS OF CITY OF GUTHRIE.

No. 4281. Opinion Filed November 26, 1912.

Rehearing Denied February 25, 1913.

(130 Pac. 265.)

MANDAMUS—Issue of Bonds—Public Utility. Where, with the proceeds of bonds issued pursuant to section 27, art. 10, of the Constitution, a bridge is intended to be constructed upon a street closed to traffic to enable the city to acquire land upon which to erect abutments, and opened again to traffic after the same is completed, the approaches over its tracks to be supplied and owned by a railroad, held that, as the proposed structure, when completed, would be a street improvement, and not a public utility owned exclusively by the city, within the meaning of said section and article, the Bond Commissioner will not be required by mandamus to approve said bonds.

(Syllabus by the Court.)

Dunn, J., dissenting.

Error from District Court, Oklahoma County;
Geo. W. Clark, Judge.

In the matter of the submission of the agreed case on the issuance of bonds by the City of Guthrie. From a judgment directing the approval of the issuance, the Bond Commissioner brings error. Refusal to approve bonds affirmed.

Chas. West, Atty. Gen., for appellant.

D. M. Tibbetts, City Atty. of Guthrie, for appellee.

TURNER, C. J. On July 18, 1912, pursuant to ordinance No. 1302, passed by the mayor and board of commissioners of the

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city of Guthrie, a city of the first class, and a proper election proclamation; there was, at an election held for the purpose of issuing public utility bonds pursuant to the provisions of section 27, art. 10, of the Constitution, submitted to the qualified property taxpaying voters of said city the proposition:

“Shall the city of Guthrie, Logan county, state of Oklahoma, incur an indebtedness by issuing its negotiable coupon bonds of the aggregate principal sum of \$25,000 for the purpose of providing funds to purchase a site and construct a bridge across the Cottonwood river in said city of Guthrie, such site and bridge to be owned exclusively by said city, and levy and collect an annual tax, in addition to all other taxes upon all of the taxable property in said city sufficient to pay the interest on said bonds as it falls due and also constitute a sinking fund for the payment of the principal thereof when due; said bonds to bear interest at a rate not to exceed five per cent. per annum, payable semiannually, and to become due 25 years from their date?”

After said bonds had been issued by the city, the same were presented to the Bond Commissioner of the state for his approval, pursuant to act of March 24, 1910 (Sess. Laws 1910, c. 94), which he refused to do, “for the reason that the purpose for which the money is to be borrowed is not a public utility, within the meaning of said section,” or, in other words, that the same were not public utility bonds. From a judgment of the district court of Oklahoma county, rendered and entered August 16, 1912, requiring him to approve said bonds, the Bond Commissioner brings the case here, and assigns for error that said judgment is contrary to law.

Although the proposition thus submitted fails to disclose the location of the bridge referred to therein, it is disclosed by the record that, within the limits of the city, Noble avenue runs east and west, and, after crossing the Santa Fe tracks and right of way at a right angle, is carried over the Cottonwood river by a bridge. To replace this bridge with the proceeds arising from a sale of the bonds, it is the intent of the city:

“* * * To secure lots on each side of Noble avenue, and on both sides of the Cottonwood river, in such way that, upon the street being vacated, the fee to the street, from a short distance within the river bank across the river to a short distance east of the river bank, would vest absolutely in the city, thus

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giving it exclusive ownership of a tract of ground which could be improved by the construction of a public utility, to wit, a bridge; both site and bridge to be owned exclusively by the city. The bridge would not cross a railroad track or any part of the railroad right of way, but would stand for its entire length upon property owned exclusively by the city. The tracks and right of way on each side of the bridge could then be crossed by viaduct approaches, to be constructed by the Santa Fe Railway Company, in such way as to be used in conjunction with the bridge constructed by the city."

After this is accomplished, it is the further intent to open Noble avenue for traffic across this bridge.

On behalf of the city, it is first contended that, the proceeding being fair on its face, it is the duty of the Bond Commissioner to approve the bonds, and that he has no right to inquire into the use to which the money arising from their sale is to be put. It would seem that, inasmuch as we have held in *State ex rel. Edwards v. Millar, Mayor, et al.*, 21 Okla. 448, 96 Pac. 747, the question of whether the provision made for the payment of interest and the creation of a sinking fund, in compliance with the requirements of law, was a proper question to be raised by the mayor and city clerk of Norman, when they were sought to be compelled by mandamus to execute a certain issue of waterworks and sewer bonds under this provision of the Constitution, and a like question was raised and answered in *State ex rel. v. Allen*, 183 Mo. 283, 82 S. W. 103, the Bond Commissioner had a right to withhold his approval of these bonds for the reason he has assigned. But let that be as it may; it being addressed to our sound legal discretion whether we will issue or withhold the writ, we will withhold it if, from the record, we are of opinion that the money arising from the sale of these bonds, if approved, will be expended by the city in erecting other than a public utility within the contemplation of said section and article of the Constitution. This was, in effect, the attitude of the court in *Dingman v. City of Sapulpa*, 27 Okla. 116, 111 Pac. 319. There, as here, so far as the record discloses, the proceeding was fair on its face; but the mayor and clerk were enjoined from issuing the bonds. The only question involved was conceded to be not whether a bridge sought to be constructed upon

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the street of a city with the proceeds of a bond issue, as here, was a public utility, but whether approaches to viaducts sought to be constructed upon such streets, with the proceeds of a similar bond issue, were public utilities. In that case the court, being of the opinion that such they were not, enjoined the mayor and clerk as prayed. And so, we repeat, we will refuse to mandamus the Bond Commissioner to approve these bonds, if the proposed structure in our opinion is not a public utility. The question, then, before us is whether the structure sought to be erected from the proceeds of the bonds will be a public utility when erected.

As stated, for the purpose of constructing this utility, it is the intention of the city to vacate Noble avenue in order to acquire title to sufficient land, in the vacated street, on both sides of the stream, upon which to erect abutments. This, we take it, so that it may be said that the utility, when constructed, is a public utility, owned exclusively by the city. But, as the same would be useless erected upon a closed street, it is the further intent of the city, upon completion of the utility, to again open Noble avenue to traffic, after the Atchison, Topeka & Santa Fe Railway Company has erected approaches thereto over its tracks.

The proposed structure is nothing more nor less than a street improvement; and that such are not public utilities, within the contemplation of the section and article, *supra*, is no longer an open question in this jurisdiction. We held this in *Coleman v. Frame*, 26 Okla. 193, 109 Pac. 928, 31 L. R. A. (N. S.) 556. In that case the city attempted, among other things, to issue public utility bonds to pave its street crossings. But the court held that such could not be done, as the same, being a street improvement, was not a public utility owned exclusively by the city. If in that case the city had proposed to first close the street, and then purchase the intersections from the abutting property owners and pave them with the proceeds of the bond issue in question, and then reopen the street, the precise question here presented would have been there decided. It goes without saying that the city here will not be permitted to do indirectly what the city there was not permitted to do directly. The reason for the holding there was that the pavement, when completed at the intersections,

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would not and could not be owned exclusively by the city. The same is true as to the bridge here in question. This for the reason that, after the spans tower aloft on their abutments, it is the purpose of the city, not to supply the approaches, but leave them to be supplied by the railroad company and carried over its tracks at both ends of the structure. As a bridge is not a bridge, but is useless, without approaches, so this bridge would not be completed and ready for use until these approaches were supplied. This being true, to say that this bridge would be, when completed, a public utility, owned exclusively by the city, would no more be true than it would be to say that a chair is owned exclusively by one person when another owns its legs; that a passenger coach is owned exclusively by one company when another owns the steps and platform; or that a sword is owned exclusively by one person when another owns the hilt.

We are therefore of opinion that the Bond Commissioner was right in refusing to approve these bonds. This for two reasons: First, because the money arising from their sale is intended to be used for street improvements; and, second, that the proposed utility, when completed, would not be owned exclusively by the city.

The writ is denied.

HAYES and KANE, JJ., concur; WILLIAMS, J., concurs in the result; DUNN, J., dissents.

BROWN et al. v. BARKER et al.

No. 1905. Opinion Filed October 22, 1912.

Rehearing Denied February 18, 1913.

(130 Pac. 155.)

ESTOPPEL—By Deed—Rights Subsequently Acquired. Where R. sold and conveyed to B. by warranty deed a town lot to which he had no title, and thereafter acquired by warranty deed from H. a perfect title thereto, **held** that the same inured **eo instante** to the benefit of his grantee, and that the lien of a judgment, rendered and entered against the grantor prior to the first deed, did not attach to the land.

(Syllabus by the Court.)

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*Error from District Court, Hughes County;
John Caruthers, Judge.*

Action by Florence A. Barker against Frank P. Brown and others. From the judgment, Brown and another bring error. Reversed and remanded.

L. S. Fawcett, for plaintiffs in error.

Lewis C. Lawson, for defendants in error.

TURNER, C. J. On March 5, 1903, Keet & Roundtree Dry Goods Company, a corporation, recovered judgment against A. J. Rogers, one of the plaintiffs in error, defendant below, in the United States Court for the Indian Territory at Wewoka, for \$202.40, which is unpaid. On May 1, 1905, Jesse H. Hill sold and conveyed to him, by warranty deed duly recorded February 12, 1906, lot 10, in block 15, in the Lewis addition of Holdenville, then Indian Territory. On February 8, 1906, said Rogers and wife sold and conveyed said lot by warranty deed, duly recorded, February 12, 1906, to Frank P. Brown. On February 2, 1906, said Brown sold and conveyed said lot, with others, by warranty deed, duly recorded, to Florence A. Barker, one of the defendants in error, for \$700 cash in hand paid, and took back a note secured by mortgage on the lots for \$300, payable February 1, 1908. On February 15, 1909, Florence A. Barker filed her petition in the district court of Hughes county against Frank P. Brown, the other plaintiff in error, A. J. Rogers, and Keet & Roundtree Dry Goods Company, setting forth the facts stated, and that she was ready and willing to, and would, pay said note but for the judgment aforesaid, which she alleges to be a cloud upon her title, and prays that said Brown and Keets & Roundtree Dry Goods Company be compelled to settle its validity, and that the same be removed. After answer filed by Brown and Rogers, in effect denying the lien of said judgment, and by Keet & Roundtree Dry Goods Company, in effect that the same was valid and subsisting, and praying that the purchase money in the hands of plaintiff be applied in satisfaction thereof, and much other prolix pleading by all concerned, there was trial to the court, and

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judgment in favor of Keet & Roundtree Dry Goods Company and against said Rogers, for the amount of said judgment and costs, which was ordered paid by plaintiff direct to said company in liquidation of its judgment and extinguishment of said lien, and Brown and Rogers bring the case here.

All parties in interest agree that the first question to be decided is:

“Was the judgment obtained by Keet & Roundtree Dry Goods Company against the defendant A. J. Rogers, on the 5th day of February, 1903, a lien on lot 10, block 15, Lewis addition, when the complaint herein was filed, to wit, February 15, 1909?”

The trial court held that it was; “that upon the conveyance of said lot to said Rogers, said judgment became a lien thereupon under the law then in force in said territory,” and that the same was still valid and subsisting. In addition to the facts stated, the record further discloses that on May 27, 1902, Mrs. Holcomb, a single woman, conveyed by bill of sale to Katie Rogers, wife of said A. J. Rogers, the right of possession only to lots 2 and 3, in block 38, in Holdenville; that she and her husband at once took possession, and fenced said lots and built a house thereon, and occupied the same as their home; that when the Town-Site Commission came along by its survey these lots were cut down, and a part of each carved into the public domain; that the part so cut off, while it still remained within their original inclosure, was taken in allotment by another, and was afterwards brought back into the town site, together with a small portion of the allotment to which it belonged, and designated as lot 10, in block 15, of Lewis addition; that while said lot was in this shape—that is, without either A. J. or his wife owning or asserting title or right of possession thereto (she having had scheduled and obtained patent to herself of what remained of lots 2 and 3)—to wit, on April 29, 1905, said Rogers and wife sold and conveyed lots 2 and 3 in block 38 and lot 10 in block 15 by warranty deed to Frank P. Brown for \$1,000, which was duly recorded May 17, 1905. Thus it will be seen that with this unsatisfied judgment outstanding against him, which from the date of its rendition was a lien upon his real estate (Mansf. Dig. sec. 3912) A. J. Rogers sold and conveyed lot 10 by warranty deed

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to Frank P. Brown, and that he afterwards acquired title thereby by warranty deed from Jesse H. Hill, the owner of Lewis addition, of date May 1, 1905. As stated, the court held, applying said statute, that on that date the lien of said judgment attached to said lot. Not so, for the reason that *eo instante* upon the delivery of said deed the title thus acquired by Rogers inured to the benefit of Brown (Mansf. Dig. sec. 642), leaving no time for the lien to attach to the land, and the title of the grantee was prior thereto. It was so held where the judgment was rendered intermediate the first and second deeds, and we see no reason why the same rule should not obtain here, independent of the question of fraud, which we shall consider later.

In *Watkins et al. v. Wassell*, 15 Ark. 73, in the syllabus it is said:

“If one sells and conveys real estate to which he has no title, or an imperfect title, at the time of the sale, and subsequently acquires a perfect title, it inures to the benefit of the grantee; and if, between the date of the conveyance and the acquisition of the perfect title a judgment is rendered against the grantor, the title of the grantee is prior to the lien of the judgment.”

In *Lamprey v. Pike* (C. C.) 28 Fed. 30, the court said:

“But with regard to the remainder of the property which is much the larger portion, it appears that, long before this judgment was rendered, Mr. Frederick Ambs had made a conveyance to Peter Ambs of the whole land, except these four lots, and that this conveyance was put on record before this judgment was rendered. It is true that Frederick Ambs afterwards acquired the legal title to that property. He had a bond, however, for the title when conveyed to Peter Ambs. It is insisted by defendant here that the title, in passing through Frederick Ambs, against whom there was this judgment, became affected with the lien of that judgment. But we are of a different opinion. We believe the true doctrine to be that in this case, by reason of the conveyance that Frederick Ambs made to Peter Ambs before he got the title, when he did get it, it inured to the benefit of Peter Ambs.”

See, also, *Skidmore et al. v. Pittsburgh, etc., Ry. Co.*, 112 U. S. 33, 5 Supp. Ct. 99, 28 L. Ed. 693; *Cocke v. Brogan*, 5 Ark. 693; *Jones v. Green*, 41 Ark. 363.

1 Black on Judgments (2d Ed.) 421 says:

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"The lien of a judgment does not in equity attach upon the mere legal title to land existing in the defendant, when the equitable title is in a third person. And transitory seisin of lands by the judgment debtor, in trust for another, will not subject the land to the judgment lien. To illustrate, in a recent case it appeared that A. agreed to purchase three lots from B. as agent for C., and the deed was made out to A., but he declined to receive it on the ground that he could not pay for the lots, and had agreed to let D. have them at the stipulated price. The agent refused to alter the deed, and D. paid the money to him, and A. conveyed the property to D. It was held that under these circumstances a judgment against A. was not a lien on the lands conveyed to D. The court observed that A. 'was vested with the naked legal title. The conveyance was made to him as a matter of convenience. He was a mere conduit, and held the legal title in trust for D. Under such circumstances A. had no interest on which the judgment became a lien. His creditors can only get what he had, and what he had was of no pecuniary value.'"

No question is raised on the *bon fides* of the conveyance of lot 10 by Rogers and wife to Brown of date April 29, 1905, and none can be for the reason that, as neither Rogers nor his wife had title to said lot at that time, this creditor could not be defrauded by a conveyance of that which could not be subject to the payment of its debt. And no fraud is attempted to be predicated on that conveyance. As to the conveyance of May 1, 1905, by which Rogers got title from Hill to the lot, and which, we have just held, inured *eo instante* to the benefit of Brown, the court found, not that the same was a fraudulent conveyance in any sense, but "that soon after so obtaining said deed from said Hill for said lot No. 10 aforesaid, said Rogers left the Indian Territory, and went beyond the jurisdiction of the courts of said territory, and ever thereafter and at the present time remained out of said territory, and beyond the jurisdiction of said court at all times thereafter, before and after statehood of this state; * * * that said Brown is the son-in-law of said Rogers and wife; that said Rogers concealed the fact that he so owned said lot then, and failed and refused to have said deed from said Hill therefor recorded until after the said sale to said plaintiff, of all of which said Brown had full and complete notice at the time he so took said deed therefor from said Rogers." All of which

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is of no consequence in the view we have taken of the case; for if neither of the conveyances mentioned were fraudulent as to this creditor at their inception, they could not be rendered such by the fact that the grantee in the second departed the state and failed to record it.

We are therefore of the opinion that, as the title to the lot in controversy passed from Rogers to Brown immediately upon the execution and delivery of the deed of May 1, 1905, from Hill to Rogers, there was no moment of time in which the lien of Keet & Roundtree Dry Goods Company could attach, and for that reason the judgment of the trial court is reversed, the cause to be proceeded with pursuant to the views herein expressed.

All the Justices concur.

SEXSMITH v. CHAPPELL.

No. 4734. Opinion Filed February 4, 1913.

(130 Pac. 282.)

1. **CLERKS OF COURTS—County Officers.** The office of clerk of the superior court is a county office.
2. **SAME—Terms—Repeal of Statute.** Section 8 of the act of March 6, 1909 (Sess. Laws 1909, c. 14, art. 7; chapter 24, art. 4, sec. 1972, Comp. Laws 1909), in so far as it affects the term of the clerk of the superior court, is repealed by section 19 of the act of March 19, 1910 (chapter 69, Sess. Laws 1910, pp. 129, 137).
3. **SAME—Election.** The laws in force in this state at the time of the holding of the election for county officers in November, 1912, provide for the election of the clerk of the superior court.

(Syllabus by the Court.)

*Error from District Court, Garfield County;
James B. Cullison, Judge.*

Action by M. T. Sexsmith against H. E. Chappell. From the judgment, Sexsmith brings error. Reversed and remanded, with instructions.

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Parker & Simons, for plaintiff in error.

McKeever & Walker and *Robberts, Curran & Otjen*, for defendant in error.

WILLIAMS, J. This proceeding in error seeks to have reviewed the judgment of the trial court adjudicating the title to the office of clerk of the superior court of Garfield county.

The same question involved in this case has this day been determined by this court in *Beaty v. State ex rel. Lee*, *post*, 130 Pac. 956, in favor of the contention of defendant in error.

The case is reversed and remanded, with instructions to grant a new trial, and to award the possession of the office of clerk of the superior court of Garfield county to the plaintiff in error.

All the Justices concur.

THE
SUPREME COURT,

STATE OF OKLAHOMA

MARCH TERM, 1918

PRESENT:

SAMUEL W. HAYES, CHIEF JUSTICE.
MATTHEW J. KANE, VICE CHIEF JUSTICE.
R. L. WILLIAMS, }
JESSE J. DUNN, } JUSTICES.
JOHN B. TURNER, }

VANSELOUS *et al.* v. McCLELLAN.

No. 2389. Opinion Filed February 11, 1913.

Rehearing Denied March 8, 1913.

APPEAL AND ERROR—Review—Briefs—Requisites—Dismissal. When plaintiff in error in his brief fails to comply with rule 25 (20 Okla. xii, 95 Pac. viii) of this court, his appeal may be dismissed.

(Syllabus by the Court.)

Error from District Court, Kay County;
W. M. Bowles, Judge.

Action by John F. Hamilton against Thomas Vanselous and another. From judgment for plaintiff, defendants bring error. Dismissed.

John S. Burger, for plaintiffs in error.

D. S. Rose, for defendant in error.

PER CURIAM. On December 24, 1907, defendant in error, John F. McClellan, sued Thomas Vanselous and James Ham-

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ilton, plaintiffs in error, in the district court of Kay county, in ejectment for certain lots described in his petition. There was trial and judgment for plaintiff, and when a second trial which was granted resulted the same way, defendants bring the case here. But we cannot pass upon the merits of this cause, but must dismiss it. This for the reason that, owing to a failure of plaintiffs in error to comply with rule 25 (20 Okla. xii, 95 Pac. viii) of this court and set forth in their brief a specification of errors complained of, we can only conjecture what is relied upon to reverse the case. Cause dismissed.

**FARMERS' & MERCHANTS' NAT. BANK OF HOBART
v. SCHOOL DIST. NO. 56, KIOWA COUNTY.**

No. 2116. Opinion Filed March 10, 1913.

(130 Pac. 549.)

1. **SCHOOLS AND SCHOOL DISTRICTS—School Buildings—Contract—Public Policy.** A contract, made with a school district board by a county superintendent of the county in which such school district was located, to build a schoolhouse for said district, is void as being against public policy.
2. **APPEAL AND ERROR—Conflicting Evidence.** Where the testimony was oral and conflicting and the finding of the court is general, such finding is a finding of every special thing necessary to be found to sustain the general finding, and is conclusive upon this court upon all doubtful and disputed questions of fact.

(Syllabus by the Court.)

Error from District Court, Kiowa County;

J. R. Tolbert, Judge.

Action by the Farmers' & Merchants' National Bank of Hobart, Oklahoma, against School District No. 56, Kiowa County. Judgment for defendant, and plaintiff brings error. Affirmed.

Geo. L. Zink and J. H. Cline, for plaintiff in error.

C. A. Morris, for defendant in error.

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WILLIAMS, J. This proceeding in error is to review a judgment wherein the plaintiff in error, as plaintiff, sued the defendant in error, as defendant, on February 7, 1907, to recover (1) the sum of \$400 and interest from December 31, 1902, on a certain school district warrant No. 2, issued by W. T. Keith, director, and F. W. Newman, clerk, of said district, alleged to have been issued when the school board of said district was in legal session and to have been registered by J. W. Clark as treasurer. It was further alleged that (2) said warrant was issued in favor of E. L. Merchant and J. P. Evans and registered by J. W. Clark, treasurer; that at said time the said Merchant and Evans had a claim against said district "for labor and material furnished and moneys advanced in the building and construction of a schoolhouse for said school district"; that said warrant was thereafter and before the commencement of said action sold and transferred to the plaintiff, which was then the owner and holder of the same; that on July 12, 1906, and various other times, plaintiff had presented to the treasurer of said district said warrant and demanded payment thereon, which had been refused; that the material and labor furnished and money advanced were presumably worth the sum of \$400, and the schoolhouse was worth the sum of \$1,200.

The defendant answered by general denial, except that it admitted that it was a school district organization, as alleged, and that the warrant was issued, but denied that it was regularly issued, and specially denied liability for the payment of the same or any part thereof, and denied that on December 31, 1902, said Merchant and Evans had a legal claim for material and labor furnished and moneys advanced, and that any claim in writing was presented to the school board as a basis of the issuance of said warrant, or that there was a legal session of the school board held on that day authorizing the issuance of said warrant, or that the treasurer of said school district registered said warrant then or at any other time. It was further alleged that neither at the time of the issuance of said warrant, to wit, December 31, 1902, nor at any time since, had a schoolhouse site been selected for said school district by a vote of the qualified electors thereof; that

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no election, special or otherwise, has ever been held in said school district at any time for the issuance of bonds to build a schoolhouse or purchase a school site; that J. P. Evans was then superintendent of public instruction for Kiowa county, and E. L. Merchant was a traveling salesman for a school furniture house; that these two persons conspired together to defraud and cheat said school district, and caused to be irregularly and illegally issued said warrant No. 2, and also warrant No. 3, the last-named one being the one sued on in this cause, for the ostensible purpose of building a schoolhouse in said district; that these two warrants were delivered to Evans and Merchant, and the following year a little schoolhouse was built by contract by a Mr. Haywroth, at a contract price of \$385, which was more than the actual cost or reasonable market value of said schoolhouse at the time of its construction or at the time of the issuance of said warrants or since; that the issuance of the warrant sued on to J. P. Evans, who was then superintendent of public instruction of said county, was contrary to public policy, and therefore rendered the same void; that the amounts of the warrants and each of them were in excess of the assessed equalized property of said school district at the time of the issuance and ever since.

Section 2408, Wilson's Rev. & Ann. St. (section 2528, Comp. Laws 1909), provides:

"That it shall be unlawful for any public officer or deputy or employee of said officer to either directly or indirectly, buy, barter for, or otherwise engage in any manner in the purchase of any bonds, warrants or any other evidence of indebtedness against this state, any subdivision thereof, or municipality therein, of which he is an officer."

Section 813, Wilson's Rev. & Ann. St. (section 1123, Comp. Laws 1909), provides:

"That is not lawful which is: (1) Contrary to an express provision of law: (2) contrary to the policy of express law, though not expressly prohibited; or (3) otherwise contrary to good morals."

J. P. Evans, as county superintendent at the time of the issuance of these two warrants to himself to build a schoolhouse, was an advisory public officer of school district No. 56, under

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section 5751, St. Okla. 1893, which prescribes among his duties that he shall "note the character and condition of the schoolhouse, furniture, apparatus and grounds, and make a report in writing to the district board, making such suggestions as in his opinion shall improve the same." A contract by such county superintendent with the officials of said school district is against public policy and void. The court made a general finding of fact in favor of the defendant (school district). See *Ray v. School District*, 21 Okla. 88, 95 Pac. 480; *School District No. 80 v. Brown et al.*, 2 Kan. App. 309, 43 Pac. 102; *Kellogg v. School District*, 13 Okla. 285, 74 Pac. 110; section 6154, Wilson's Rev. & Ann. St. 1903; section 8056, Comp. Laws 1909.

It is settled by numerous decisions of this court that where testimony was oral and conflicting, and the finding of the court is general, such finding is a finding of every special thing necessary to be found to sustain the general finding, and is conclusive upon this court upon all doubtful and disputed questions of fact. *Deming Investment Co. v. Love*, 31 Okla. 146, 120 Pac. 635; *Bohart v. Matthews*, 29 Okla. 315, 116 Pac. 944; *Bretch Bros. v. Winston & Sons*, 28 Okla. 625, 115 Pac. 795; *Alcorn et al. v. Dennis*, 25 Okla. 135, 105 Pac. 1012; *McCann v. McCann et al.*, 24 Okla. 264, 103 Pac. 694; *Robinson & Co. v. Roberts*, 20 Okla. 787, 95 Pac. 246.

It follows that the judgment of the lower court will be affirmed.

All the Justices concur.

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No. D-5. Opinion Filed March 11, 1913.

(130 Pac. 906.)

CONSTITUTIONAL LAW — Governmental Powers — Encroachment on Judiciary. Section 266, Comp. Laws 1909, in so far as it prohibits a disbarment of an attorney for acts involving moral turpitude, disconnected with his professional or official duty as an attorney, until after conviction therefor, is not violative of the provisions of the Constitution vesting in the various courts of the state the judicial power of the state, and prohibiting the exercise by one of the three great departments of the government of the power properly belonging to the other departments.

(Syllabus by the Court.)

In the matter of proceedings to disbar E. I. Saddler. Recommendations of a referee that a demurrer to the petition should be sustained. Confirmed.

HAYES, C. J. After several affidavits had been filed in this court charging respondent of having been guilty of certain alleged unlawful and corrupt conduct, this court appointed a member of the Bar Commission to investigate said complaints, and make recommendations thereon to the court. The member of the Bar Commission so appointed, after making investigation, filed in this court his petition for the disbarment of respondent, in which it is alleged that respondent did willfully and corruptly in the month of July, 1909, in the city of Guthrie, county of Logan, in this state, offer to pay to one James Noble the sum of \$10 if said Noble would procure in advance for respondent the questions prepared by the state of Oklahoma, to be submitted to persons applying for certificates to teach school in the state, and that such examination questions were sought by the said Saddler with the intention to, and that he did, sell the same to persons applying at the examinations held by the state for the issuance of certificates to teachers. It is alleged that he offered to procure, and did procure, the services of one John Anderson to sell copies of the questions to persons who were applicants, which would en-

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able incompetent teachers to prepare for said examination and fraudulently secure certificates to teach school; that said Anderson while in the employ of said respondent sold to one L. W. Flowers, an applicant to teach school, a copy of said questions for the sum of \$10; that he sold a set of said examination questions to other applicants to teach whose names are set out in the petition. Some of these sales were effected by respondent in person and others through agents employed by him; and he offered to sell such questions to various persons, in addition to those to whom he did sell. In answer to the petition respondent denies all of the charges made therein against him. The court thereupon appointed a referee to hear the evidence, and make and report to this court his findings of fact and conclusions of law. After the referee had heard some testimony in support of the charges, he announced that he was of the opinion that the demurrer of respondent to the petition upon the ground that the facts alleged by the petition did not sufficiently constitute a cause of action against respondent, and that the grounds alleged in said petition constitute none of the statutory grounds upon which a disbarment proceeding may be submitted, should be sustained; and further taking of testimony was suspended, and the referee reported to this court his conclusions of law upon the questions presented by the demurrer for decision of this court before further proceeding with the hearing of evidence.

By section 265, Comp. Laws 1909, any court of record is authorized to revoke or suspend the license of an attorney to practice therein after a copy of the charges against him shall have been delivered to him by the clerk of the court in which the proceeding is begun, and an opportunity is given him to be heard in his defense. The succeeding section prescribes the grounds upon which such suspension or revocation may be had in the following language:

“The following are sufficient causes for suspension or revocation: First, when he has been convicted of a felony under the laws of Oklahoma, or a misdemeanor involving moral turpitude, in either of which cases the record of conviction is conclusive evidence. Second, when he is guilty of a willful disobedience or violation of any order of the court requiring him to do or

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forbear any act connected with or in the line of his profession. Third, for the willful violation of any of the duties of an attorney or counselor: Provided, that whenever any act is done by the attorney for an honest purpose or with the intent to discover the truth in some matter heretofore being litigated and pending in any tribunal at the time the acts were done, or to prevent litigation, then they shall not be grounds for revocation or suspension of the attorney's license. The filing of any pleading or exhibit in court shall not be cause for suspension or revocation of the attorney's license, but may be punished as a contempt and according to the laws governing proceedings in contempt cases. An attorney's license shall not be revoked or suspended for any cause or in any manner except as provided in this chapter of the statutes of this state as amended by this act."

The same section further provides that if on the trial the evidence shows the acts with which respondent is charged do not fall within one of the provisions contained in the section, or they are barred by the statute of limitations in the act provided, the attorney accused shall stand acquitted; and by section 267 it is provided that all actions for suspension or removal shall be brought within one year after the action charged was committed and not thereafter. That it was intended by the statute to prohibit the revocation of the license of an attorney for any other grounds than those specified in the statute cannot be doubted. The language of the statute is susceptible of no other construction. While the acts with which respondent is charged involve moral turpitude, in that by them, if they are true, he attempted and practiced a fraud upon the state by corruptly enabling persons who were not competent to teach school to secure certificates of authority to teach, and thereby defeated the purposes of the statutes of the state requiring that teachers shall possess the qualifications prescribed by the statute before certificates are issued to them, and in accomplishing this unlawful purpose, he stood ready and willing to corrupt other persons to procure for him surreptitiously or otherwise copies of the questions in advance that he might barter and sell them to prospective applicants for teachers' certificates; but it is not charged that, if said acts constitute a violation of any statute, he has been indicted and convicted therefor; and the charges made do not, therefore, come

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within the first provision of section 266, *supra*. Nor is he charged with being guilty of a willful disobedience or violation of any order of court requiring him to do or forbear any act connected with or in the line of his profession. The acts committed by him, of which complaint is made, are wholly disconnected with any duty or relation of his profession as an attorney.

If the first clause of the statute quoted above stood alone in connection with that portion of the statute which prohibits the revoking of any license except for the causes provided in the statute, it is clear that the effect of the statute would be to authorize a court to disbar an attorney for no other cause than an act or acts involving moral turpitude of which the person charged has been convicted. It would be immaterial whether the immoral conduct pertained to the official or professional life and duties of the attorney, or to his private life. In neither event could a disbarment occur until after a conviction for the offense. But this clause of the statute must, like all statutes, be construed in its relation to all other parts of the statute, so that each and every part will harmonize. It is clear that the second clause authorizes a disbarment for disobedience or violation by an attorney of any order of the court connected with the office of attorney; and the third clause authorizes a disbarment for a violation of any of the duties of attorney or counselor, which duties are, to some extent, specifically defined by section 257, Comp. Laws 1909. A violation of the duties of an attorney or the disobedience of an order of court relative to some official duty may or may not constitute a criminal offense for which a prosecution lies. As to the grounds of the disbarment provided by the second and third clauses, there is no provision that there shall be a conviction before an order of disbarment may be made, and they must be construed as a limitation upon the first clause. Reading the entire statute together, we think the legislative intent was to provide, not that no attorney shall be disbarred in any event for the commission of an offense against the criminal statutes of the state, unless he has been previously convicted, but to provide that no such disbarment shall occur for such an offense until after conviction, where the offense was disconnected with any act of will-

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ful disobedience or violation of any order of court requiring him to do or forbear any act connected with the line of his profession, or unrelated to any of his duties as an attorney or counselor and constituting no misconduct in office; and the statute thus construed further prohibits the disbarment of an attorney for any act involving moral turpitude, disconnected with any professional or official duty, if such act is not one for which a prosecution and conviction lies. The offense or offenses with which respondent is charged in this case fall within the class last mentioned above. It is not charged that the acts complained of constitute the violation of any statute for which a prosecution may be had; and, if any statute exists making such acts a criminal offense, it has not been called to our attention, and we have been unable to find it. The acts charged, however, do in our opinion evidence deficiency in character and moral turpitude. "Moral turpitude" has been defined as including any act evidencing baseness, vileness, or depravity in private and social duties which a man owes to his fellow man, or to society in general, contrary to justice, honesty, or good morals. *State v. Mason*, 29 Ore. 18, 43 Pac. 651, 54 Am. St. Rep. 772; *Barter v. Mohr*, 37 Misc. Rep. 833, 76 N. Y. Supp. 982; *In re Disbarment of Coffey*, 123 Cal. 522, 56 Pac. 448; *In re Kirby*, 10 S. D. 322, 414, 73 N. W. 92, 907, 39 L. R. A. 856, 859.

The purposes and effect of the act with which respondent is charged would be to defeat the laws of the state, requiring those to whom certificates to teach are issued to possess qualifications prescribed by the statute, and considered necessary for the protection and welfare of the children of the state. His conduct was such as to enable those who availed themselves of the benefit thereof to practice a fraud upon the state; but it in no way constitutes a violation of any order of court connected with or in line of his profession, nor does it grow out of any professional or official duty or relation existing by reason of his position as an attorney. The offense, therefore, charged against respondent does not constitute a cause for disbarment under the terms of the statute, and the demurrer to the petition should be sustained, unless

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the statute is void as being in conflict with the Constitution of the state.

This statute was in force in the territory of Oklahoma at the time of the admission of the state, and was by the Enabling Act and the Schedule to the Constitution extended in force in the state, unless in conflict with the Constitution of the state. There is no specific provision in the Constitution conferring upon any court power either to admit or to disbar attorneys. If the Constitution vests in any court or courts the power to determine for what causes an attorney may be disbarred, as well as to determine when an offense has been committed by an attorney that renders him subject to disbarment, it is done by implication, and not by specific provision. In considering the question of the validity of this statute, it must be done with full observance of the rule that must always govern courts in determining the constitutionality of any statute, which requires that the statute shall be sustained, unless its conflict with the Constitution is clear and free from doubt.

Section 1, art. 7, of the Constitution, vests all judicial power of the state in the Senate, sitting as a court of impeachment, a Supreme Court, district courts, county courts, courts of justices of the peace, municipal courts, and such other courts, commissions or boards, inferior to the Supreme Court, as may be established by law. We do not think it can be doubted that the power to determine whether any person has committed acts or has been guilty of conduct which at common law or by provision of statute has been declared to constitute a cause for disbarment is a judicial power that can be exercised only by the courts, and not by the Legislature, under a Constitution where there is a division of the powers of government vested in different departments, and a limitation imposed by the Constitution that the power vested in one department shall not be exercised by either of the others; but that it is in every instance a judicial power to determine what acts or conduct shall constitute a cause for disbarment is not so free from doubt. There is much vagueness of thought and expression in the cases from the courts upon this question, due, no doubt, in the main, to the fact that the question has been pre-

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sented directly to the courts in but few cases. There are many decisions, both state and federal, which contain the general statement that the power of disbaring attorneys is an inherent power in the courts, or that it is a power necessarily possessed by all courts having authority to admit attorneys to practice. *In re Peyton*, 12 Kan. 399; *In re Smith*, 73 Kan. 743, 85 Pac. 584; *State ex rel. v. Winton*, 11 Ore. 456, 5 Pac. 337, 50 Am. Rep. 486; *Sanborn v. Kimball*, 64 Me. 140; *State v. Kirke*, 12 Fla. 278, 95 Am. Dec. 314; *Davis v. State*, 92 Tenn. 634, 23 S. W. 59; *Scott v. State*, 86 Tex. 321, 24 S. W. 789; *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205; *Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552; *Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366.

By a careful consideration of these cases, however, and others of similar import, it is disclosed that they are authority only for the proposition that, in the absence of specific constitutional or statutory provision conferring authority upon the courts to disbar, the courts have power by virtue of the common law to disbar attorneys for certain causes; and they are no authority for determining to what extent the Legislature may limit or regulate this power existing at common law. An illustration of the indefiniteness with which the question has been dealt is to be found in *Re Peyton*, *supra*, where in the opinion it is said :

"We suppose that all courts authorized to admit attorneys may also disbar them upon sufficient cause being shown; that such power is inherent; that it is a necessary incident to the proper administration of justice; that it must be exercised without any special statutory authority and in all proper cases, unless positively prohibited by statute; and that it must be exercised in the manner that will give the party to be disbarred a fair trial and an opportunity to be heard."

This language is not accurate, if it is meant that the power to disbar is inherent in the courts in the sense that the power to punish for contempt is inherent in them; for in that event the Legislature could not prohibit the exercise of the power, and a positive prohibition of statute would have no effect upon the question. In many of the states statutory enactments have been made providing grounds upon which attorneys may be disbarred,

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and the courts have uniformly enforced them without any question as to the power of the Legislature to prescribe grounds for disbarment; for, by the weight of authority, it has been held that the grounds enumerated in such statutes are not exclusive, and that, in addition to the causes prescribed by the statute, the courts may disbar for other grounds existing at common law. *Beene v. State*, 22 Ark. 149; 4 Cyc. 905. But these cases are authority for the proposition only that such statutes should be construed as not intending to limit the power of the courts to disbar for the causes enumerated in the statute, and cannot be taken as authority for the proposition that the Legislature has no power to limit the courts with respect thereto. This latter question has been directly considered in but few cases that we have been able to find, which are as follows: *In re Eaton*, 4 N. D. 514, 62 N. W. 597; *In re Collins*, 147 Cal. 8, 81 Pac. 220; *Ex parte Schenck*, 65 N. C. 353; *In re Haywood*, 66 N. C. 1; *In re Ebbs*, 150 N. C. 44, 63 S. E. 190, 19 L. R. A. (N. S.) 892, 17 Ann. Cas. 592.

In the *Collins* case, *supra*, the statute involved was very similar to the one involved in the instant case, except that it contained no prohibition against the courts' disbarring for other causes than those specified in the statute. The court, after quoting from *Ex parte Yale*, 24 Cal. 241, 85 Am. Dec. 62, the following:

"The manner, terms, and conditions of their admission to practice, and of their continuance in practice, as well as their powers, duties, and privileges, are proper subjects of legislative control to the same extent and subject to the same limitations as in the case of any other profession or business that is regulated by statute"

—said:

"In the plenitude of its power, as announced in this case, the Legislature of the state has plainly defined the causes for which an attorney may be deprived of his right to practice. This it had the right to do, and its specification of such causes is, in our judgment, conclusive on this court. And to the extent that an attorney may be disbarred for causes which affect his moral integrity in dealings with others of a purely personal character, and transacted in his private capacity, the statute has provided that it shall be done by the court only when he has been convicted of a felony, or of a misdemeanor involving moral turpitude."

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In the North Carolina cases the statutes specifically prohibit the disbarment upon any other grounds than those enumerated in the statute, and the validity of the statute was sustained. The power to disbar is not necessary to the existence of courts; and originally such power was not exercised by them for the reason that parties to a suit were required to appear in person and were not permitted to be heard by attorneys, and, after barristers or counselors at law were permitted in England to appear for parties to an action, they were not appointed by the court, but were called to the bar by the inns of court, and the admission of attorneys has been from time to time in England regulated by statute. *State v. Kirke, supra*. And there appears to be but little division among the authorities that the power to prescribe the qualifications for admission to the bar is a legislative power, and the almost uniform legislation upon the subject in the various states is to prescribe what shall constitute qualifications sufficient to entitle one to be admitted to the bar, and vests the court with jurisdiction to determine when an applicant possesses the prescribed qualifications. Following the establishment of the right of litigants to appear by counsel in court, there came to be recognized a jurisdiction and power in the courts to punish attorneys for misbehaving in the practice of their profession, and to disbar them for official misconduct. The power in the courts to disbar, therefore, is of common-law origin, while the power to admit is of statutory origin. *Ex parte Bradley*, 7 Wall. 364, 18 L. Ed. 366; *State v. Kirke, supra*.

If the power in every case to determine upon what grounds an attorney may be disbarred is a power inherent in the courts in the sense that the power to punish for contempt is inherent, then the grant by the Constitution of judicial functions includes the power to disbar attorneys, and to strike their names from the roll, and the Legislature cannot by statutory enactment prohibit the exercise of this power. The power to punish for contempt is inherent in the courts, because of the necessity of such power in the due administration of justice by them. Does such a necessity for the power to disbar and to determine in all instances what shall constitute causes for disbarment exist? Argument full of

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sound reason can be adduced to sustain the proposition that the power to disbar an attorney for professional misconduct or neglect of duty, such as obstructs the administration of justice, interrupts the orderly procedure of the courts, brings reproach and contempt upon them or violates his fiduciary relation toward his client, is so necessary to the full and complete administration of justice that such power cannot be taken from the courts by legislative enactment. But does such a necessity exist when applied to the non-professional misconduct of an attorney, such as acts that may show deficiency in character and a lack of proper regard for his duties toward mankind generally, but that do not relate to his professional or official duties as an attorney? We are of the opinion that no such necessity is manifest as will authorize us to declare the statute involved void. That the men composing the bar shall be men of high integrity and of unquestionable character in their private lives as well as in their official and professional lives should not be underestimated; but the office of attorney in the courts is of no more importance in the administration of justice than of the judge who presides over it, and it would not be contended that it is essential to the administration of justice by the courts that the courts shall have the power to determine, independent of control by statute, what acts shall constitute a sufficient cause for removal of a judge from office. The statute here involved undertakes to prescribe a rule that no attorney shall be disbarred for acts in his private life, disconnected with his professional duties, although they involve moral turpitude, until he has been convicted therefor. Independent of any statute upon this question, there is a division among the authorities as to whether at common law such acts constituted a cause for disbarment until after conviction. Mr. Justice Bradley, delivering the opinion of the court in *Ex parte Wall*, *supra*, states the general rule to be that previous to conviction an attorney shall not be struck off the roll for an indictable offense, committed by him when not acting in his character of attorney; but he sustained the disbarment in that case as falling within an exception to the general rule. A careful review and analysis of the authorities by Mr. Justice Field in the dissenting opinion establishes, we

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think, that the weight of authority, both English and American, supports the doctrine that no disbarment should be made under the rule at common law for offenses that had no connection with the party's professional conduct until after indictment and conviction, and to the same effect is 4 Cyc. 910; *State v. Winton, supra*. The statute, in providing that no disbarment shall be made for acts involving moral turpitude, disconnected with any professional misconduct, until after conviction, definitely fixes a rule about which under the common law there was much conflict in the authorities; and it is not clear to us that in so doing the statute interferes with any inherent power of the courts and should be declared invalid. The right to pursue one's chosen calling and for which he has spent a large portion of his life in preparation, and which to an extent may have unfitted him for earning a support for himself and those dependent upon him in a different vocation, is a valuable right, and his legal status relative thereto should be made as definite and certain as is possible, without infringing upon any necessary power of the court.

We therefore hold that in so far as the statute here involved prohibits a disbarment for acts involving moral turpitude, but disconnected with the professional or official duties of an attorney, until after conviction therefor, the same is not violative of the provisions of the Constitution, vesting in various courts of the state judicial power and prohibiting the exercise by one of the three departments of government of the power properly belonging to the other departments.

The recommendation of the referee that the demurrer to the petition should be sustained is confirmed.

All the Justices concur.

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ST. LOUIS & S. F. R. CO. v. YOUNG.

No. 1018. Opinion Filed March 11, 1913.

(130 Pac. 911.)

1. **PLEADING—Motion to Make More Definite and Certain—Time—Extension of Time “to Plead.”** A motion to make more definite and certain, which is provided for by section 5659, Comp. Laws 1909, may be made at any time within the period allowed to answer or demur by section 5645, Comp. Laws 1909, and if the defendant obtains an extension of time in which “to plead,” he does not thereby waive the right to make such motion within the time so extended.
2. **JUDGMENT—Pleadings—Undisposed of Motion.** Where a motion to make a petition more definite and certain, not frivolous, has been filed by a party within the time to plead, and is pending undisposed of and not waived, a judgment upon the pleadings against the defendant cannot be taken.

(Syllabus by the Court.)

Hayes, C. J. dissenting.

Error from Creek County Court;
John C. Davis, Judge.

Action by Wm. A. Young against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

W. F. Evans and R. A. Kleinschmidt, for plaintiff in error.

F. W. Jacobs and J. Harvey Smith, for defendant in error.

KANE, J. This was an action commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, to recover for work and labor. In due time the defendant filed a special appearance, and moved to quash the summons, which was overruled by the court, whereupon the court granted the defendant “30 days in which to plead.” Within the time “to plead” granted by the court the defendant filed a motion to require plaintiff to make his petition more definite and certain. Thereafter the plaintiff filed a motion for judgment on the plead-

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ings which motion the court, without considering defendant's motion to make more definite and certain, sustained, and, without hearing any evidence, rendered judgment for the plaintiff, to reverse which this proceeding in error was commenced.

The first, and only, question of any seriousness in the case is: Was the order of the court, "30 days in which to plead," broad enough to authorize the defendant to file a motion to make more definite and certain within the time to plead granted by the court? Our former opinion was based upon the theory that by the leave granted the defendant was restricted to filing an answer, demurrer, or a pleading of the class set out in section 5626, Comp. Laws 1909, which provides:

"The only pleadings allowed are: First. The petition by the plaintiff. Second. The answer or demurrer by the defendant. Third. The demurrer or reply by the plaintiff. Fourth. The demurrer by the defendant to the reply of the plaintiff."

Upon further reflection, that is too narrow a construction to place upon the words "to plead," as used in the order of the court. It has been the general understanding among the lawyers of this jurisdiction for a great many years that, when leave to plead out of time is granted in the general language of the order herein, it is sufficient to authorize the party securing the leave to file within the extension any of the motions or pleadings provided for by law. That counsel for defendant in error do not form the exception to the general rule above stated is apparent from the following excerpt taken from their brief:

"We admit that the defendant below had a right to file that motion and have it acted upon within the 30 days, and, before it was in default, file the pleading it took leave to file."

That also is the practice which seems to be approved in ?1 Enc. of Pl. & Pr. 701, where it is said:

"Where an extension of time for pleading or pleadings after the prescribed period has been allowed, it is advisable that the party benefited thereby should comply strictly with the order as made; because, unless the leave were general, 'to plead, answer, or demur,' the authorities are not in unison upon the question whether the party is entitled to put in any pleading, or motion in the nature of one, but that specified in the order."

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The form approved by the text certainly contemplates that leave "to plead" embraces leave to file all other pleas or motions except those embraced within leave "to answer or demur."

Section 5659, Comp. Laws 1909, provides:

"If redundant or irrelevant matter be inserted in any pleading, it may be stricken out, on motion of the party prejudiced thereby; and when the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment."

The foregoing statute clearly provides for a motion to make more definite and certain, but neither the statute nor any rule of court fixes any definite time in which the motion must be made.

In *A., T. & S. F. Ry. Co. v. Lambert*, 31 Okla. 300, 121 Pac. 654, it was held that the proper time to file a motion to quash a summons is "within the time to plead."

In *Young v. Lynch*, 66 Wis. 514, 29 N. W. 224, a motion to make more definite and certain was filed within an extension of time "to answer or demur," provided for by stipulation. The court held:

"A motion that the complaint be made more definite and certain may be made at any time within the period allowed for answering; and, if the defendant obtains a stipulation extending the time to answer or demur, he does not thereby waive the right to make such motion within the time so extended."

In the opinion, Taylor, J., discussing this proposition, says:

"In this case the motion was made before the time to answer had expired; but it is urged by the learned counsel for the respondent that the right to make the motion was waived by obtaining a stipulation extending the time to answer or demur; and that, having obtained that stipulation extending the time, and not having reserved in terms the right to make such motion in the meantime, he waived such right. We think this objection to the motion should not prevail. Neither the statute nor the rules of court fix any definite time within which the defendant must make his motion; and as one object of the motion is to enable the defendant to answer understandingly, and as the plaintiff may of his own motion, and without leave of the court, amend his complaint and make it more definite and certain if it be defective in that respect, at any time before the time to answer has expired,

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the defendant may make his motion to require it to be done within the same time."

There is a dearth of authority on the exact question under consideration, but what there is clearly supports the conclusion we have reached. The Wisconsin case, however, is strongly in point, and, as the statute of Wisconsin upon which the opinion is based is substantially the same as our own, we consider it very persuasive.

Having reached the conclusion that the defendant, under the leave granted, was entitled to file a motion to make more definite and certain, the authorities uniformly support the proposition that where a motion to make a petition more definite and certain, not frivolous, has been filed by a party within the time to plead, and is pending undisposed of and not waived, a judgment upon the pleadings against the defendant cannot be taken. *A., T. & S. F. Ry. Co. v. Lambert*, 31 Okla. 300, 121 Pac. 654; *Chivington v. Colorado Springs Co.*, 9 Colo. 597, 14 Pac. 212; *Farris v. Walter*, 2 Colo. App. 450, 31 Pac. 231; *Story v. Ware*, 35 Miss. 399, 72 Am. Dec. 125; *Blythe et al. v. Hinckley et al.* (C. C.) 84 Fed. 228; *Atchison, etc., Ry. Co. v. Nicholls*, 8 Colo. 188, 6 Pac. 512; *Ridgway v. Horner*, 55 N. J. Law, 84, 25 Atl. 386.

The judgment of the court below is reversed, and the cause remanded, with directions to grant a new trial.

DUNN and TURNER, JJ., concur; HAYES, C. J., dissents; WILLIAMS, J., absent, and not participating.

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ALMEDA OIL CO. v. KELLEY.

No. 1475. Opinion Filed March 11, 1913.

(130 Pac. 931.)

INDIANS—Indian Lands—Mining Lease—Disaffirmance—Removal of Restrictions. An allottee of the Cherokee Tribe of Indians prior to the removal of his restrictions executed a mining lease upon his allotment subject to the approval of the Secretary of the Interior. After the lease had been submitted and while pending before the Secretary of the Interior, lessor's restrictions on alienation of his lands were removed, and he then protested against the approval of the lease, which was denied and the lease approved. On suit brought to cancel the same as a cloud upon the title to the land involved, it was held by the trial court that the lease was invalid. **Held, error.**

(Syllabus by the Court.)

Kane, J., dissenting.

*Error from District Court, Washington County;**John J. Shea, Judge.*

Suit by Fred L. Kelley against the Almeda Oil Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with instructions.

*Charles C. Julian, for plaintiff in error.**W. H. Kornegay, for defendant in error.*

DUNN, J. This is an action to remove cloud from title, brought originally by defendant in error, hereinafter called plaintiff, against plaintiff in error, hereinafter called defendant, in the United States Court for the Northern Judicial District of the Indian Territory before the admission of the state. After the admission of the state, the cause was transferred under the provisions of the Enabling Act and the Schedule to the Constitution to the district court of Washington county, where there was a trial to the court without a jury, which resulted in a general finding of the facts in favor of plaintiff, and a judgment as prayed for in his petition.

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The allegations of plaintiff's amended petition, in substance, are that the land in controversy was allotted to one Edward B. Lynch, a citizen of the Cherokee Nation, in 1904; that the restraints upon his power of alienation were removed by the Secretary of the Interior on the 23d day of January, 1906; that thereafter on the 19th day of February, 1907, Lynch by warranty deed conveyed the land to plaintiff; that on the 13th day of June, 1904, after the allotment of the land to him, Lynch signed and executed an oil and gas lease to defendant covering the land in question (a copy of which lease was embodied in the petition); that the lease was presented to the Secretary of the Interior for his approval and disapproved; that thereafter, after the removal of restrictions upon the alienation of said land, the disapproval of said lease was set aside by the Secretary of the Interior; that the lease, over the protest and against the objection of the allottee, Lynch, and without the consent of plaintiff, was approved on the 19th day of August, 1907, and a copy of such lease approved was delivered to defendant; and alleges that defendant has taken no steps to develop the land and has failed to pay the royalties called for in said purported lease for a period of more than 60 days. The evidence, as set forth in the abstract of defendant, and which appears to be undenied, establishes the citizenship of Lynch; that the land in controversy was his allotment; that restraints upon his authority to alienate were removed by the Secretary of the Interior on the 23d day of January, 1906; that on June 13, 1904, an oil and gas lease subject to the approval of the Secretary of the Interior, was executed by the allottee to the defendant; that February 19, 1906, Lynch protested in writing to the Department of the Interior, against its approval; that one year later he executed and delivered to plaintiff his warranty deed; that after the sale of the land he continued his efforts to secure the cancellation of the lease; that the protest filed by him against its approval was denied, and the same was finally approved August 26, 1907; and that this suit to cancel it was filed 38 days thereafter.

The proof eliminates necessity of consideration of all the averments of the petition upon which plaintiff relies, with the

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exception of the authority of the Secretary of the Interior to approve the lease in the face of the protest of the lessor and after his restrictions on alienation had been removed; but the questions presented by this situation are perplexing and not easy of decision.

The allotment of the grantor was taken by him with restrictions on his right of alienation and his authority to rent the same, and the terms are set forth in section 72 of the act of Congress approved July 1, 1902 (chapter 1375, 32 St. at L. 716), which, among other things, provides:

“Cherokee citizens may rent their allotments when selected for a term not to exceed one year for grazing purposes only, and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same; but leases for a period longer than one year for grazing purposes and for a period longer than five years for agricultural purposes and for mineral purposes may also be made with the approval of the Secretary of the Interior and not otherwise. Any agreement or lease of any kind or character violative of this section shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity.”

The parties to this contract were both qualified to enter into it; the consideration was valid, the subject-matter legal, and there was a mutuality of obligation depending merely upon the approval of the Secretary of the Interior. The contract is not assailed on any of the grounds which usually render contracts invalid, but solely upon the ground that, prior to the time when the Secretary acted, one of the contracting parties had changed his mind and desired to withdraw therefrom, and further that his right to deal with his land had been finally and completely vested in him, and hence the Secretary's power or authority to approve it had lapsed.

There is a paucity of authority upon the direct question involved, but in principle the case of *Pickering v. Lomax et al.*, 145 U. S. 310, 12 Sup. Ct. 860, 36 L. Ed. 716, and the cases which have since followed it, to wit, *Taylor et al. v. Brown et al.*, 147 U. S. 640, 13 Sup. Ct. 547, 37 L. Ed. 313, *Jones v. Meehan*, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49, *Lykins v. McGrath*, 184 U. S. 169, 22 Sup. Ct. 450, 46 L. Ed. 485, and *Ingraham et al. v. Ward et al.*, 56 Kan. 550, 44 Pac. 14, are sufficiently akin to render

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them very persuasive, if not complete, authority for holding that the Secretary of the Interior did not exceed his authority, under the circumstances, in giving to the lease his sanction and approval.

It is to be noted that the statute above quoted provides that allotments may be rented for mineral purposes with the approval of the Secretary of the Interior and not otherwise. The act does not provide within what time the Secretary of the Interior shall be required to make the approval, and, except for the fact that plaintiff in this case had notice of the lease when he purchased, he would not be bound by it.

The Supreme Court of the United States, in the case of *Pickering v. Lomax et al.*, *supra*, which related to the leasing and conveyance of lands owned by certain Indians under the treaty of Prairie du Chien, which provided that the same should never be leased or conveyed to any persons whatever without the permission of the President of the United States, discussing the same, said:

"The treaty does not provide how or when the permission of the President shall be obtained, and there is certainly nothing which requires that it shall be given before the deed is delivered. *Godfrey v. Beardsley*, 2 McLean, 412, Fed. Cas. No. 5,497. It is doubtless, as was said by the Supreme Court of Mississippi in *Doe v. Partier*, 12 Smedes & M. [Miss.] 425, 427, 'a condition precedent to a perfect title' in the grantee; but the neglect in this case to obtain the approval of the President for thirteen years only shows that for that length of time the title was imperfect, and that no action of ejectment would have lain until the condition was performed. Had the grantee the day after the deed was delivered sent it to Washington and obtained the approval of the President, it would be sticking in the bark to say that the deed was not thereby validated. A delay of thirteen years is immaterial, provided, of course, that no third parties have in the meantime legally acquired an interest in the lands. If, after executing this deed, Robinson had given another to another person, with the permission of the President, a wholly different question would have arisen. But, so far as Robinson and his grantees are concerned, the approval of the President related back to the execution of the deed and validated it from that time. As was said by this court in *Cook v. Tullis*, 85 U. S. (18 Wall.) 332, 338, 21 L. Ed. 933, 936: 'The ratification operates upon the act ratified precisely as though authority to do the act had been pre-

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viously given, except where the rights of third parties have intervened between the act and the ratification. The retroactive efficacy of the ratification is subject to this qualification. The intervening rights of third persons cannot be defeated by the ratification."

From the record it appears that the defendant has complied with its part of the contract in all particulars. The approval of the lease by the Secretary of the Interior related back to the date of its execution between the parties and rendered it valid from that time. It occurs to us that, if the removal of restrictions on allottee's complete right to lease would have any effect whatever, it would be to render the contract of the parties complete, to be annulled only on or for some of the grounds under which equity gives relief. This conclusion on our part relieves us of a consideration of the character of the case filed, and we have determined the issues between the parties on the record presented as they are argued in the briefs.

Under these circumstances, the judgment of the trial court should be reversed, which is accordingly done, and the cause remanded, with instructions to set the same aside and enter one in accordance with this opinion.

HAYES, C. J., and TURNER, J., concur. WILLIAMS, J., concurs in the conclusion. KANE, J., dissents.

HAMPTON *et al.* v. THOMAS *et al.*

No. 1747. Opinion Filed March 11, 1913.

(130 Pac. 961.)

1. **APPEAL AND ERROR—Failure to File Brief—Review—Reversal.** Where plaintiff in error has served and filed his brief in compliance with rule of this court, and defendant in error has neither filed a brief nor offered an excuse for such failure, the court is not required to search the record to find some theory upon which the judgment of the court below may be sustained, but may, where the brief appears reasonably to sustain the assignments of error, reverse the case in accordance with the prayer of the petition.

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2. **APPEAL AND ERROR—Review—Findings.** Where a case is tried before a court without a jury, as where it is tried before a jury, if there is absence of any evidence reasonably tending to support the finding of the court, the finding of the court and the judgment thereon will be set aside on appeal.

(Syllabus by the Court.)

Error from District Court, Mayes County;

T. L. Brown, Judge.

Action by Thomas C. Thomas and others against Bettie Hampton and another. Judgment for plaintiffs, and defendants bring error. Reversed and remanded.

J. G. Austin, for plaintiffs in error.

HAYES, C. J. Defendants in error, who, with plaintiff in error Bettie Hampton, are the joint owners of a certain tract of land situated in Mayes county, brought this action against plaintiffs in error Bettie Hampton and her husband, Bert Hampton, to obtain a decree of partition, and for a money judgment against plaintiff in error Bert Hampton for rents and profits that they allege said plaintiff in error has received and collected from the land during the years 1907, 1908, and 1909. The trial was to the court without a jury, and resulted in finding of fact in favor of defendants in error, and judgment decreeing a partition, and also judgment in their favor against plaintiff in error Bert Hampton for the sum of \$175. To reverse this latter judgment this appeal is prosecuted.

Plaintiffs in error have, in full compliance with rule of this court, filed their brief herein, but no brief has been filed by defendants in error nor excuse made for such failure. By reason of Rule 7 (20 Okla. viii, 95 Pac. vi), where plaintiff in error has served and filed his brief in compliance with rule of this court, and defendant in error has neither filed a brief nor offered an excuse for such failure, the court is not required to search the record to find some theory upon which the judgment of the court below may be sustained, but may, where the brief appears reasonably to sustain the assignments of error, reverse the cause in accordance with the prayer of the petition in error. *Ellis v. Outler*, 25 Okla. 469, 106 Pac. 957; *Buckner v. Okla. Nat. Bank of Shawnee et al.*,

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25 Okla. 472, 106 Pac. 959; *Flanagan v. Davis et al.*, 27 Okla. 422, 112 Pac. 990; *Rudd v. Wilson et al.*, 32 Okla. 85, 121 Pac. 252.

One of the assignments of error urged in plaintiffs in error's brief for reversal is that the findings and judgment of the trial court are not sustained by the evidence. In investigating this assignment we have not only reviewed the evidence as contained in the abstract in plaintiffs in error's brief, but have carefully read the record, and are of the opinion that it should be sustained. There is an absence of any evidence tending to show that plaintiff in error Bert Hampton was in possession of the premises during the years 1907, 1908, and 1909, or that he collected the rents or received any rents or benefits therefrom for said years. There is also an absence of evidence tending to show the rental value of the land in controversy during said period of time. Where a case is tried before a court without a jury, as where it is tried before a jury, if there is absence of any evidence reasonably tending to support the finding of the court, the finding of the court and the judgment thereon will be set aside on appeal. *Reeves & Co. v. Brennan*, 25 Okla. 544, 106 Pac. 959.

There are other errors assigned in plaintiffs in error's brief, but they are without merit.

For the reasons above stated, the judgment of the trial court is reversed and the cause remanded.

DUNN, KANE, and TURNER, JJ., concur; WILLIAMS, J., not participating.

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ATCHISON, T. & S. F. RY. CO. v. STATE *et al.*

No. 1976. Opinion Filed March 11, 1913.

1. **CARRIERS — Corporation Commission — Contempt Proceedings — Pleading—Jury Trial.** In a proceeding in contempt for the punishment of a corporation for the violation of an order of the Corporation Commission, pursuant to Act May 29, 1908, Sess. Laws Okla. 1907-08, p. 228, verification of the information filed with the commission is waived by answering to the merits. **Held,** further, that in such proceeding the contemnor is not entitled to a trial by jury.
2. **SAME—Appeal from Orders of Commission—Presumption.** Evidence examined, and **held** that the *prima facie* presumption of reasonableness and justness attending the order of the commission fining appellant for violating rule 6 of order No. 168 requiring carriers to begin the forward movement of freight towards its destination within 24 hours after the bill of lading is signed, has not been overcome.

(Syllabus by the Court.)

Appeal from the State Corporation Commission.

The Atchison, Topeka & Santa Fe Railway Company was assessed with a fine for contempt in violating an order of the Corporation Commission, and it appeals. Affirmed.

Cottingham & Bledsoe, for appellant.

Chas. West, Atty. Gen., and *Chas. L. Moore* and *C. J. Davenport*, Asst. Attys. Gen., for appellees.

TURNER, J. On November 6, 1909, appellee, the Plansifter Milling Company, a corporation, by unverified petition, informed the Corporation Commission, concerning appellant:

"That on November 2, 1909, about 4 p. m., we billed out car flour and bran No. 32599CRI&P destined to Moore, Okla., and received B-L from their agent for same at this time. We called them by telephone on 11-3, 11-4, 11-5 and insisted upon same being pulled from our mill and started on destination. We took the matter up with Mr. Teasdale D. F. A. of said road and he had to wire Supt. W. K. Etter before they moved car, which was done about 5:30 p. m. on November 5th."

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On November 9, 1909, the Corporation Commission issued its citation directed to appellant, and attached thereto a copy of said information, alleged a violation of the commission's order No. 168, and cited appellant to appear before the commission on a day certain and show cause why a fine should not be assessed against it for contempt. On January 12, 1910, came appellant and answered, and for cause, among other things, alleged that insufficient trackage in Oklahoma City caused a congestion of traffic which resulted in the car in question not being moved until November 5, at which time it was moved from the switch to the company's track and began its further movement to destination on November 6. On January 12, 1910, after hearing duly had, the commission found that appellant had violated rule 6 of the order No. 168, requiring freight to begin its forward movement towards its destination within 24 hours after the bill of lading is signed, and fined appellant \$200 and cost for the violation of said order, in that it had failed to move the car delivered to it in the time thereby prescribed. The company brings the case here.

The information was unverified, but the commission nevertheless had jurisdiction of the subject-matter.

In *St. Louis & S. F. R. Co. v. State et al.*, 26 Okla. 62, 107 Pac. 929, 30 L. R. A. (N. S.) 137, which was, as this, a contempt proceeding, we said:

"On May 29, 1908, the Legislature enacted a statute providing for the punishment of any corporation, person, or firm for contempt for the violation of any order or requirement of the Corporation Commission. Sess. Laws 1907-08, p. 228. Section 1 of the act makes any corporation, person, or firm that violates an order of the commission subject to a fine of not exceeding \$500, and each continuance of the violation a separate offense. Section 2 of the act prescribes the procedure for contempt proceedings. It is provided that such proceeding may be instituted by any citizen of the state or other parties affected by the order of the commission by filing an affidavit with the Corporation Commission setting forth the acts of omission or failure to comply with such order or requirement. Since the adjudication provided by the statute in these proceedings is wholly punitive, a proceeding thereunder must be deemed quasi criminal, if not criminal, and, in the prosecution of such proceeding, the pro-

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cedure prescribed by the statute should be strictly pursued. 4 Encyc. of Plead. & Prac. pp. 767, 770, and authorities there cited. Before any proceeding for contempt may be begun, an affidavit setting forth the fact prescribed by the statute must be presented to and filed with the commission. * * * *State ex rel. v. Lavery*, 31 Ore. 77, 49 Pac. 852; *State v. Kaiser*, 20 Ore. 50, 23 Pac. 964, 8 L. R. A. 584. See, also, *Back et al. v. State of Nebraska*, 75 Neb. 603, 106 N. W. 787."

What is said in that case is confined to a proceeding by affidavit. There was also a motion to quash. Section 2 also provides that the procedure may be by information. Further on the section reads: "Upon the filing of such affidavit or information above mentioned"—i. e., information setting forth the acts of omission or failure to comply with any order or requirement of the commission—"it shall be the duty of the commission to forward to such offending corporation * * * a copy of such affidavit or information. * * *"

Section 3 provides that the default of defendant shall be deemed an admission of the material allegations in such affidavit or information, etc. As Bouvier's Law Dictionary defines an information to be "a complaint or accusation exhibited against a person for some criminal offense," it would seem that this statute intended to provide that in civil constructive contempts the procedure should be by affidavit, and in criminal or quasi criminal constructive contempts, by information. But upon this we express no opinion. It is sufficient to say that in contempts of this kind, proceeded against by information, verification thereof is unnecessary to vest the court with jurisdiction.

People v. News-Times Pub. Co., 35 Colo. 253, was a proceeding by the Attorney General, by unverified information, in contempt against defendant for the publication of a newspaper article reflecting upon the court. The contempt alleged was declared by the court to be criminal, which, quoting from Rapalje on Contempts, sec. 12, was defined to be "all those acts in disrespect of the court or its process, or which obstruct the administration of justice, or tend to bring the court into disrepute." The objection was to the jurisdiction of the court on the ground

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that the information was unverified. But the court overruled the same and held verification to be unnecessary, and said:

"No common-law right of the respondent was violated, because, as will be seen by the authorities hereinafter cited, it was permissible at common-law to initiate this proceeding on unverified information."

—citing *People v. Court Sessions*, 31 N. Y. Supp. 375; *State v. Morrill*, 16 Ark. 384; *State v. Frew*, 40 N. H. 428; *R. R. Co. v. Androscoggin*, 49 Me. 392; *Bate's Case*, 55 N. H. 326; *Dandridge's Case*, 2 Va. Cas. 408; *Moore's Case*, 63 N. C. 397; *In re Daeton*, 105 N. C. 59; *Telegraph Newspaper Co. v. Commonwealth*, 172 Mass. 294; and also *State v. Shepherd*, 177 Mo. 205.

But, however this may be, if this information was by the statute (Comp. Laws 1909, sec. 6644) required to be verified, being intended for the personal benefit of the appellant, it may waive the same, and did so by answering to the information without moving to quash or set it aside. *In re Talley*, 4 Okla. Cr. 398, 112 Pac. 36.

It is next contended that as rule 6 only applies to intrastate shipments, the order is void as an interference with interstate commerce. As the finding of the commission was, in effect, that the car in question was not so engaged, the burden of showing the contrary is upon appellant, as the order is *prima facie* just, reasonable, and correct. Upon this point it is disclosed by the record that such contention was not set up in the answer, nor was any attempt made by appellant to prove it before the Corporation Commission. The nearest approach thereto was, when appellant was attempting to prove that petitioner had defrauded it by securing a rate to which he was not entitled, and hence, had it known such to be a fact, the same would have justified a refusal on its part to remove the car at all, petitioner testified:

"Q. Did you not use the milling-in-transit privilege in the billing of that car from Enterprise, Kansas, when you billed that car out from your mill to Moore, Oklahoma? A. I used the billing on it that applied from Enterprise."

This was manifestly insufficient to prove the shipment was one interstate, the best evidence of which were the records of

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appellant. As such would have disclosed the character of this shipment, it is but fair to presume that, had they been produced, the disclosure would not have been to the advantage of appellant. We therefore conclude that the shipment was not interstate, and being intrastate, as found, the order must stand. *A., T. & S. F. Ry. Co. v. State et al.*, 33 Okla. 158, 124 Pac. 56.

There is no merit in the contention that appellant was entitled to a trial by jury. Concerning contempts, in *People v. News Company*, *supra*, quoting from section 21 of Rapalje on Contempts, the court said:

"The framers of our Constitution never intended to thus interfere with the due and orderly administration of justice. It was not their purpose to have the procedure designated in the sections mentioned cover contempts of court, and thus give this class of offenses a status theretofore unknown in either the statutory or the common law. The constitutional guaranties apply to such acts as constitute violation of public and general laws. They leave contempts, which are simply acts in disobedience of judicial mandates or process, or which tend to obstruct the dignified and effective administration of justice, to be dealt with in the summary manner theretofore universally followed."

(But see Const., art. 2, sec. 25, as to orders of injunction or restraint.)

For the reason that, after reading the entire evidence, we are unable to say that the failure to comply with the commission's order was occasioned by a congestion of traffic which appellant did its best to relieve by theretofore and up to that time attempting in good faith to extend its trackage facilities, as contended, we are unable to say that the *prima facie* presumption of reasonableness and justness attending the order has been overcome, the same must prevail, and the order is affirmed.

All the Justices concur.

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CONWILL v. ELDRIDGE.

No. 1981. Opinion Filed March 11, 1913.

(130 Pac. 912.)

1. **TRIAL—Time of Trial—Right to Delay—Waiver—Continuance.** By reason of section 5834, Comp. Laws 1909, where the issues in a case are made up during a term of court, the case is not triable at said term earlier than ten days after the date the issues are made up; and it is error for the court to compel a party, over his objection upon this ground, to proceed to trial of the case on an earlier date. But where no objection is made that the case is improperly set for trial, and party moves for a continuance of the cause upon the ground only that a witness who had promised him to be present was absent, he will be held to have waived any objection to the case having been prematurely set for trial.
2. **EVIDENCE—Opinion—Nonexperts—Sanity.** Where nonexpert witnesses testify that they have observed the conduct of a person whose sanity is in question, and state the facts which they observed and upon which they base their opinions, they may give their opinions as to the sanity of such person.
3. **APPEAL AND ERROR—Review—Verdict—Insufficient Evidence.** Where there is lacking any evidence reasonably tending to support any essential issue that was or must have been found in favor of the prevailing party in order to return a general verdict for him, or to support any special finding of fact in his favor essential to his right to prevail, such verdict or finding will be set aside by this court, and a new trial granted.

(Syllabus by the Court.)

Error from District Court, Texas County;
R. H. Loofbourrow, Judge.

Action by J. D. Conwill against W. H. Eldridge. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Plaintiff in error brought this action in the court below to recover the sum of \$1,117.74 upon two certain promissory notes made and executed to plaintiff in error by defendant in error. Defendant, who is represented by his guardian, admits in his answer the execution and delivery of the notes, but as a defense against any liability thereon he alleges: First. That at the time

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they were executed he was mentally incompetent and incapable of entering into a valid contract. Second. That the consideration for which said notes were executed was the purchase price of one jack, and that plaintiff secured the execution and delivery of said notes by false and fraudulent representations that the jack for which they were executed and delivered was sound and in every way and manner suitable for breeding purposes, when in truth and in fact he was entirely and wholly worthless for breeding purposes, and without value, all of which facts were known to the plaintiff at the time of his making said false and fraudulent representations, and were unknown to the defendant; that said representations were made for the purpose of deceiving and defrauding defendant; and that he did rely upon same, and was thereby deceived and defrauded. Defendant alleges that plaintiff was enabled to accomplish his fraud by the senility and weakness of mind of defendant. He alleges that the jack has since died, and he is for that reason unable to offer to return same to plaintiff; that the jack's death occurred without fault of defendant, but, if it be found that he was of value, defendant stands ready, able, and willing to pay into court, for the use of plaintiff, the amount of such value. By way of cross-petition, he further alleges that at the time of the execution of said notes, as a part of the consideration for the jack, defendant delivered to plaintiff two horses, which were of the reasonable value of \$150, for which, on account of the worthlessness of the jack and the false and fraudulent statements of plaintiff, defendant has received no consideration whatever. He thereupon prays that plaintiff take nothing by the action, but that he have judgment on his cross-petition for the sum of \$150. In a reply, plaintiff denied all the affirmative allegations of defendant's answer. The trial, which was to a jury, resulted in a general verdict and special findings of fact in answer to special interrogatories in favor of defendant, upon which the trial court rendered judgment in defendant's favor for the sum of \$150 and costs.

Crow & Gleason and R. L. Howsley, for plaintiff in error.

Wiley & Edens, for defendant in error.

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HAYES, C. J. (after stating the facts as above). During term time, on the 28th day of October, 1909, the issues in the case were joined. At this time the cause was set down, and thereafter came on for trial on the 2d day of the following November. On the last-mentioned date, plaintiff presented to the court his motion for continuance, upon the ground that one of his material witnesses had promised him that he would attend the trial of the cause and testify whenever plaintiff would notify him to come, but that this witness had, after letter written to him by plaintiff advising him of the date, failed to attend, and was then absent. He sets forth in his motion the facts to which the absent witness would testify, if present. The overruling of this motion for continuance is the basis of the first assignment of error urged. Counsel for plaintiff contend in this court that by reason of section 5834, Comp. Laws 1909, the cause was not triable on the date for which it was set, and he urges in this court solely upon this ground that the court committed error in not granting to plaintiff a continuance. Said statute, where the issues thereto are settled during the term of the court, makes a case triable at the same term of court only after the expiration of ten days from the date the issues are made up. *City of Ardmore v. Orr, ante*, 129 Pac. 867. And it is error for the court to compel a party, over his objection upon this ground, to proceed to a trial of the case on a date earlier than ten days after the issues are made up. Such error on the part of the trial court renders the judgment voidable only, and not void. It is not a jurisdictional error, which cannot be waived by the party.

The statute is for the benefit of the parties to the action only. It secures to them in all cases a reasonable time after issues joined in which to secure witnesses and prepare for trial. It does not affect third parties, or the state, suing for the benefit of the parties only; they may consent to a trial upon an earlier date than that fixed by statute. By proceeding to trial without objecting thereto, a party acquiesces therein, and, after the trial has resulted adversely to him, he should not be permitted to object that the judgment was erroneous because the case was not triable. Plaintiff made no objection in the trial court that the case was not prop-

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erly upon the trial docket, and therefore, under the foregoing statute, was not triable; but he there treated the case as if it was properly upon the docket, and sought a continuance upon the statutory ground of an absent witness. In this court he does not urge that the court committed error in overruling his motion for continuance upon the grounds upon which he sought the continuance in the trial court; but he here seeks to have the action of the court declared error upon another ground. Nothing is better settled than that one cannot proceed in the trial of questions in the trial court upon one theory, and, having lost, change front and try to prevail on appeal. *Bullen v. Arkansas, etc., Ry. Co.*, 20 Okla. 819, 95 Pac. 476; *Harris v. First, etc., Bank*, 21 Okla. 189, 95 Pac. 781; *Border v. Carrabine*, 24 Okla. 609, 104 Pac. 906.

Had plaintiff objected to proceeding to trial upon the ground that the case was not triable upon the date for which it was set, or had he made a motion to strike the same from the trial docket for such reason, and saved his exception to the action of the trial court in refusing to sustain his objection or motion, the act of the court would then be reversible error; but since he failed to do this, and treated the cause as properly on the trial docket and triable, and sought a continuance upon other grounds, he will be held to have waived his right under the statute and consented to the trial of the cause, except upon the grounds set forth in his motion, which are not urged in this court.

Several assignments are urged for reversal, complaining of the admission of testimony relative to the sanity or insanity of the defendant at the time he executed the notes. Several witnesses, who did not qualify as experts, after testifying as to their acquaintance with the defendant and to their observation of his acts, and some of them as to transactions with him, were permitted to give their opinions as to the soundness or unsoundness of his mind, or as to his competency to transact his business. The contention of plaintiff that a nonexpert witness may not give his opinion as to the soundness or unsoundness of mind of a person, because it states a conclusion, is opposed by the leading text-writers and weight of authority upon the question. Where nonexpert witnesses testify that they have observed any person

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whose sanity is in question, and state the facts which they observed and upon which they base their opinions, they may give their opinions as to the sanity of such person. Elliott on Ev. vol. 1, p. 681; Wigmore on Ev. vol. 3, secs. 1917, 1938; *Atkins v. State of Tenn.*, 119 Tenn. 458, 105 S. W. 353, 13 L. R. A. (N. S.) 1031.

One of the grounds urged for a new trial in the court below and here is that the general verdict of the jury and some of the special findings of fact in favor of defendant are not supported by the evidence. The execution and delivery of the notes is admitted by defendant's answer. Plaintiff's ownership thereof at the present time is established by uncontroverted evidence. In order, therefore, for defendant to prevail in this action, it is necessary that he establish one of three defenses, to wit: That at the time of the execution of the notes he was entirely without understanding; or there has been a failure of consideration; or that the notes were procured by the fraud of plaintiff. There is a special finding of fact that defendant was at the time of the execution of the notes entirely without understanding. Persons entirely without understanding are incapable of making a contract, and any attempt on their part to do so is void; but we fail to find any evidence in the record that supports this finding of the jury. There is considerable testimony tending to show that defendant is weak-minded, and that as he has grown older the weakness of mind has increased; that he is hard of hearing, and is unable to read or write. But, by the same witnesses, it is established that up to the time of this transaction and afterwards he constantly transacted his own business, and, in doing so, has made a number of trades for and purchases of property. One witness, who had made trades with defendant, testified that he seemed flighty like. Another witness, who had rented land from him and had worked with him, testified that he was with him a great deal about the time the transaction involved occurred, and that he did not observe anything unusual in his actions, other than he had observed theretofore; that he had traded horses with defendant, and that the property he exchanged was worth as much as that which he received from defendant. A son of defendant testified that his

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father, in making certain trades, had been cheated, or permitted the other person to get the advantage in the trade, and that he had been lax in enforcing or collecting obligations due him; but by the testimony of this witness it is shown that defendant made all his trades, and always looked after his own business, which consisted in farming and raising stock.

All of the evidence relative to the condition of defendant's mind is substantially of the character of the evidence above referred to; and while some of it tends to establish that defendant's mind was in such condition that he might have been more easily subjected to fraud, and advantage taken of him, than a person of sound mind and full understanding, none of it tends to establish that he was entirely without understanding. At the time of the execution of the notes, defendant's incapacity had not been judicially determined. In order for one of unsound mind, but not entirely without understanding, to rescind contracts made before his incapacity has been judicially determined, he must restore to the other party everything he has received from him, or must offer to return same upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so. Sections 5041 and 1137, Comp. Laws 1909. The contract of such a person is not void, but voidable. *Maas et al. v. Dunmyer*, 21 Okla. 434, 96 Pac. 591. Since there is no evidence tending to show that defendant was entirely without understanding, in order for him to prevail in this action, it is necessary for him to establish the alleged fraud of plaintiff in securing said notes, or the failure of consideration; and there are special findings by the jury to the effect that the notes were executed in consideration of the purchase price of the jack, and that the fraudulent representations as alleged in defendant's answer were made by the plaintiff, and that said jack was worthless.

Plaintiff testified in his rebuttal testimony that the notes involved were executed to him in payment for a horse of the present value of from \$1,000 to \$1,200, purchased by defendant from plaintiff, and now owned by defendant. A purported full abstract of the evidence is set out in plaintiff's brief, and plaintiff's counsel assert in their brief that there is no evidence whatever

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to show that the jack was the consideration for which the notes were executed. Counsel for defendant have failed to set out in their brief or to direct us to any evidence in the record that establishes this issue. There is evidence showing that the jack was purchased by defendant from plaintiff and that plaintiff made false and fraudulent representations as to the condition of the jack; but the record is entirely silent as to what defendant was to pay for the jack, or how it was paid. One witness for defendant testified to statements of plaintiff to the effect that other considerations than these notes had been given by defendant to plaintiff for the horse, which plaintiff testified was the consideration of the notes; but this witness did not testify that the notes in controversy were given for the jack, or to any statement of plaintiff to that effect. Whether the purchase price of the jack was the consideration for the notes was squarely put in issue by the pleadings, and the burden was upon defendant to establish such fact before he could prevail in either his defense of failure of consideration or that the notes were procured by fraud.

The finding of the jury favorably to defendant upon his cross-petition is also unsupported by the evidence in essential particulars. The evidence establishes that several transactions have occurred between plaintiff and defendant at different times at or prior to the execution of the notes. Defendant's cross-petition alleges that, as a part of the consideration for the jack, he sold to plaintiff two horses, of the value of \$150. There is evidence tending to show that at a time subsequent to the purchase of the jack defendant did sell to plaintiff two horses for the sum of \$100, which the witness testified plaintiff stated he would credit upon the note for the jack; but as to whether the notes upon which it was to be credited were either of the notes in controversy the evidence is silent, and there is absence of any evidence as to the value of such horses. Referring to plaintiff's contention that such evidence is lacking, counsel for defendant in their brief state:

"It is further contended by plaintiff in error that there was no evidence tending to prove the \$150 counterclaim asked for by defendant. We are frank to confess that the evidence on this

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proposition was possibly not very definite; but there was evidence of the defendant showing that the defendant delivered to the plaintiff, as a part of the consideration for this jack, two horses or mares, and that there was an agreement at the time of the delivery of these horses or mares that the plaintiff should credit the defendant on the notes sued on in the sum of \$100."

The admission of counsel that there is no evidence showing the value of the horses is correct; but their statement that the record shows that the purchase price of said horses was to be credited upon the notes sued upon is not supported by reference to any evidence in the record to that effect, and after a thorough search of the record we have been unable to find any. Appellate courts should be reluctant to set aside verdicts of juries that have been approved by the trial court; but where there is lacking any evidence reasonably tending to support any essential issue that was or must have been found in favor of the prevailing party in order to return a general verdict for him, or to support any special finding of fact in his favor essential to his right to prevail, such verdict or finding will be set aside by this court and a new trial granted. *Gergens v. McCollum*, 27 Okla. 155, 111 Pac. 208.

Several assignments urged are based upon instructions given over plaintiff's objection; but an examination of them discloses that those which are not wholly without merit would have been cured by the special findings of fact made by the jury, had all such findings been supported by evidence, and we therefore do not deem it necessary to consider these assignments.

For the reasons herein suggested, the judgment of the trial court is reversed, and the cause remanded.

DUNN, KANE, and TURNER, JJ., concur; WILLIAMS, J., not participating.

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TERRITORY *ex rel.* JOHNSTON, Co. Atty., *et al.* v.
WOOLSEY *et al.*

No. 2077. Opinion Filed March 11, 1913.

(130 Pac. 934.)

1. **MUNICIPAL CORPORATIONS—Fraudulent Claims—Settlement—Taxpayers' Action—Persons Entitled to Sue.** By reason of sections 7413 and 7414, Comp. Laws 1909, upon the performance of conditions therein prescribed, an action may be maintained in the name of the state on relation of one or more resident taxpayers of a city against any officer of a city who has transferred property of the city or paid out its money in settlement of a claim known to such officer to be fraudulent, or void, or in pursuance of any unauthorized, unlawful, or fraudulent contract and against any person to whom or for whose benefit such money shall have been paid, to recover the property or double the value of the property so transferred, or double the amount of money so misappropriated.
2. **SAME—Fraudulent Payment—Actions—Authority of County Attorney.** Said statute does not authorize an action to be maintained for the purposes therein mentioned in the name of the state on the relation of the county attorney.
3. **SAME—Property Unlawfully Disposed of—Action Against Officer—Limitations.** Said statute, in so far as it authorizes an action to be maintained in the name of the state for the recovery of double the value of the property transferred or double the amount of money so misappropriated, or money unlawfully paid out, authorizes the recovery of a penalty; and such action, by reason of section 5550, Comp. Laws 1909, must be brought within one year after the cause of action accrues.
4. **LIMITATION OF ACTIONS—Raising Defense of Statute—Demurrer.** Where a petition upon its face shows that the cause of action is barred by the statute of limitation, it is proper to sustain a demurrer thereto upon that ground.
5. **PLEADING—Petition—Amendment.** Where an amended petition is not made as an amendment to the preceding petition or petitions, but is made as a substitute and is a complete petition in itself and contains no reference to any prior petition or petitions or to the exhibits thereto attached, the allegations of the prior petitions, except as repeated in the amended petition, are abandoned, and the court cannot look to preceding petitions for the purpose of a demurrer to the amended petition.

(Syllabus by the Court.)

Territory ex rel. Johnston, Co. Atty., et al. v. Woolsey et al.

*Error from District Court, Noble County;
W. L. Barnum, Judge.*

Action by Territory of Oklahoma, on relation of Henry S. Johnston, County Attorney, and others, against J. P. Woolsey and others. Judgment for defendants, and plaintiffs bring error. Reversed and remanded.

H. A. Johnson, for plaintiffs in error.

James B. Diggs and *S. H. Harris* (*H. B. Martin*, of counsel), for defendants in error.

HAYES, C. J. This action was instituted in the district court of Noble county in the name of the territory of Oklahoma, on relation of Henry S. Johnston, as county attorney of Noble county, and on the relation of 27 resident taxpayers of the city of Perry. The action was begun and prosecuted for the recovery of \$60,282.34, being double the amount alleged to have been misappropriated by the defendants in error J. P. Woolsey, as mayor of the city of Perry, and W. H. Kirchner, James Lobsitz, J. C. Fleming, L. B. Le Grant, E. R. Stagg, and C. G. Jones, as members of the city council of the city of Perry, and John Knox, as treasurer of the city, from the funds of said city for the purpose of procuring a right of way for the Arkansas Valley & Western Railway Company through the city.

The action is prosecuted under the authority of an act of the Legislature of March 8, 1901 (Sess. Laws 1901, p. 169; sections 7413, 7414, Comp. Laws 1909). The provisions of the act controlling the case are to be found in sections 2 and 3 thereof, which, in so far as they are applicable to the issues here involved, are as follows:

"Sec. 2. That every officer of any * * * city, * * * who shall hereafter order or direct the payment of any money or transfer of any property belonging to such * * * city * * * in settlement of any claim known to such officers to be fraudulent or void, or in pursuance of any unauthorized, unlawful or fraudulent contract or agreement made, or attempted to be made for any such * * * city * * * by any officer or officers thereof, and every person having notice of the facts, with whom such unauthorized, unlawful or fraudulent contract

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shall have been made, or to whom, or for whose benefit such money shall hereafter be paid, or such transfer of property shall be made, shall be jointly and severally liable in damage to all innocent persons in any manner injured thereby, and shall be further jointly and severally liable to the * * * city * * * affected for double the amount of all such sums of money so paid, and double the value of the property so transferred as a penalty to be recovered at the suit of the proper officer of said * * * city, * * * or of any resident taxpayer thereof, as hereinafter provided.

"Sec. 3. That upon the refusal, failure or neglect of the proper officer of any * * * city, after written demand made upon them by ten resident taxpayers of such * * * city to institute or diligently prosecute proper proceedings at law or in equity for the recovery of any money or property belonging to such * * * city, paid out or transferred by any officer thereof, in pursuance of any unauthorized, unlawful, fraudulent or void contract, made or attempted to be made, by any of its officers for any such * * * city, or for the penalty provided in section 2 of this act, any resident taxpayer of such * * * city affected by such payment or transfer after serving the notice aforesaid and after giving security for costs, may, in the name of the territory of Oklahoma, as plaintiff, institute and maintain any proper action at law or in equity, which the proper officers of the * * * city might institute and maintain for the recovery of such property, or of said penalty, and any such municipality shall in such event be made defendant, and one-half the amount of money, and one-half of the value of the property recovered in any action maintained at the expense of a taxpayer under this action, shall be paid to such resident taxpayer as a reward."

To the original petition a motion to make more definite and certain was sustained. An amended petition was filed to which was attached as exhibits the warrants upon which it is alleged the money was illegally paid out by defendants in error. Afterwards, a second amended petition was filed, to which a demurrer was sustained, and, plaintiffs in error refusing to plead further, judgment was rendered, dismissing the cause, from which judgment this appeal is prosecuted.

The demurrer, sustained to the second amended petition, contains numerous grounds, but not all of them were urged in the court below. The principal grounds relied upon are that there is a

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misjoinder of parties plaintiff, and that the action was barred by the statute of limitations. Counsel for defendants in error state in their brief in this court that the propositions of law raised by their demurrer are: First. A number of persons having distinct causes of action against a defendant or defendants cannot join in an action as plaintiffs against such defendants for the purpose of enforcing such demands. 'In order for persons to be joined as plaintiffs in an action, they must have some joint or common interest in the cause of action stated in the petition against the defendants. Second. That the statute authorizes the suit to be maintained upon the relation of one taxpayer only; and that such suit cannot be maintained by several taxpayers jointly. The third and fourth propositions are that the action is barred, either in whole or in part, by the statute of limitations.

In view of the number of times it as been held that the misjoinder of parties plaintiff is no ground for demurrer to the petition under our Code, we cannot treat the proposition presented by the first ground of demurrer as an open one in this jurisdiction, and we therefore shall not review the numerous authorities cited by counsel in their brief from other jurisdictions in support of their contention. *Stiles v. City of Guthrie*, 3 Okla. 26, 41 Pac. 383; *Weber v. Dillon*, 7 Okla. 568, 54 Pac. 894; *Martin v. Clay et al.*, 8 Okla. 46, 56 Pac. 715; *Lee et al. v. Mehew et al.*, 8 Okla. 136, 56 Pac. 1046; *Choctaw, O. & G. Ry. Co. v. Burgess*, 21 Okla. 653, 97 Pac. 271.

Assuming, as contended by counsel for defendants in error, that the petition states a separate cause of action in favor of the several taxpayers and not a joint one, and that the demurrer attacks the petition upon the ground of misjoinder of causes of action also, still plaintiffs' action should not have been dismissed. While a petition that states separate causes of action in favor of several parties plaintiff is vulnerable to demurrer on the ground of improper joinder of several causes of action, the trial court in sustaining the demurrer upon such ground should not dismiss the action without giving the plaintiffs an opportunity to file their several petitions, if they desired to further prosecute their respective suits upon request for an opportunity to do so.

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Weber et al. v. Dillon, supra; Martin v. Clay et al., supra. Waiving the foregoing rule, however, the contention of defendants in error that the statute, in that it provides that suit may be instituted and maintained by "any resident taxpayer of such city," authorizes the suit to be prosecuted in the name of the territory or state on the relation of only one taxpayer, is not sound. It is true that the action is a statutory one, and he who seeks to prosecute it must find all of his authority within the terms of the statute; and the statute, in so far as it imposes upon the offending officer a liability for double the amount of any money misappropriated or double the value of any property wrongfully transferred, is penal in its character. All the authorities hold that "penal statutes" include any act which imposes by way of punishment any pecuniary mulct or damages beyond compensation for the benefit of the injured party or recoverable by an informer, or which for like purpose imposes any special burden or takes away or impairs any privilege or right. Section 531, Lewis' Sutherland, Stat. Const. This statute clearly falls within the foregoing definition, and is to be, like all penal statutes, strictly construed. *Commonwealth v. Winchester*, 3 Clark (4 Pa. Law J. 371) 34, *Vinton et al. v. Welsh*, 9 Pick. (Mass.) 87, and *Fowler v. Tuttle*, 4 Fost. (24 N. H.) 9, are relied upon to support the contention that "any resident taxpayer" should be strictly construed to mean only one taxpayer. These cases involve statutes in character similar to the one here under consideration, but the decisions therein were made without reference to any statute similar to the one existing in this state, subsequently considered. If any such statute existed in states from which those decisions came, the court did not refer to them.

By section 2964, Comp. Laws 1909, it is provided that in all statutes a word used in the singular number includes the plural, and the plural, the singular, except where a contrary intention plainly appears. It does not plainly appear from this act that it was intended that the singular term used should not include the plural. On the other hand, a consideration of this phrase in connection with the context indicates a different legislative intent. An action cannot be instituted by a taxpayer or taxpayers until

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two things have occurred, in addition to the unlawful act of the officers: First, the officer whose duty it is to prosecute an action for the recovery of the money misappropriated or the property wrongfully transferred and for the penalty must have failed to prosecute such action; and, second, such failure and refusal must have occurred after demand therefor by ten resident taxpayers of the city. In the initial step to prosecute an action under this statute by a taxpayer more than one taxpayer, to wit, ten, must participate. There can be no reason why it should be required that the procedure in part should be participated in by ten taxpayers, but that the remaining steps of the prosecution must be participated in by only one taxpayer. On the other hand, there is reason why fewer than the required number to make the demand upon the officer should be permitted to prosecute the suit; for it could easily occur that taxpayers, knowing the violation of the law and the misappropriation of property by the officer of the municipality, would be willing to demand that the officer whose duty it is to bring suit should perform his duty, and yet not be willing, out of aversion to litigation or unwillingness to incur expense by participating in the prosecution of an action, to join in the prosecution of the action. A suit prosecuted by and on the relation of more than one taxpayer places upon the defendant no greater burden than a suit prosecuted by one. It in no way increases his liability. One penalty only is demanded, and any defense he may have cannot be prejudiced by the joinder of plaintiffs. In this contention we are supported by the following cases in point: *Wells v. Cooper*, 57 Conn. 52, 17 Atl. 281; *Chaput v. Robert*, 14 Ont. App. Rep. 354; *State ex rel. Carter v. Wilmington & Weldon R. Co.*, 126 N. C. 437, 36 S. E. 14.

The statute, however, does not authorize the action to be maintained in the name of the territory or state on relation of the county attorney. The state has no interest in the action; it receives no benefit from its prosecution; and, although it is made by the statute the nominal party, the real parties in interest are the informers and the city, which, by the statute, is required to be made a defendant; and the only persons authorized to inform

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and prosecute the action in the name of the state are resident taxpayers. In so far as the statute authorizes the recovery of a penalty, the rule of strict construction applies as to who may recover, and only those named in the statute may prosecute the action; and, since the county attorney is not named, he is without authority to prosecute the action, either in his own name, or in the name of the state.

The second amended petition of plaintiffs in error is divided into two paragraphs. In the first paragraph, in addition to alleging jurisdictional facts, they allege the misappropriation by the defendant city officers of the sum of \$30,141.17 of money belonging to the city of Perry, which they allege was paid out by the city officers in pursuance of an unauthorized, unlawful, and void contract attempted to be made between the officers and the railway company. The date of this contract they allege is unknown to them. They then refer to the foregoing act of 1901, and allege that by reason thereof the defendants and each of them are liable to the city for the sum unlawfully paid out; and, after alleging demand upon the officers of the city whose duty it is to prosecute this action, and failure of such officers to do so, they ask judgment for the sum of \$30,141.17 as the amount of money misappropriated. The second paragraph, by reference, realleges all the facts alleged in the first paragraph, and, in addition thereto, alleges that by reason of the act of the Legislature of 1901 the defendants are severally and jointly liable for the money so paid out as a penalty, and the plaintiffs are entitled to recover the further sum of \$30,141.17 as a penalty. Although it appears that they have attempted by thus dividing up their two amended petitions to state two causes of action, the petition as a whole states in fact but one cause of action, which is the right to recover the penalty imposed by the statute in double the amount of the money misappropriated. The second section of the statute, *supra*, creates two liabilities and authorizes two actions: First, an action by any innocent person for any damages he may have sustained by reason of the unlawful act of the officers' misappropriating or unlawfully transferring the property; and, second, an action by the city or by the resident taxpayers for double the

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amount of any money misappropriated or the value of any property illegally transferred as a penalty. Section 3 prescribes the procedure that must be taken by the taxpayers in the prosecution of an action by them when they have not sustained any damage by the unlawful acts of the delinquent officer or officers. Under the procedure prescribed, the right of action to a taxpayer does not accrue, unless the officers of the city whose duty it is to prosecute the action for the city refuse to do so after demand made by ten resident taxpayers of the city. In the event such officer or officers refuse to institute or diligently prosecute such an action "for the recovery of any money or property belonging to such city, * * * or for the penalty provided in section 2, * * *" then the resident taxpayers may institute and maintain an action "for the recovery of such property or for such penalty," one-half of the money or one-half of the value of the property recovered in the action maintained by the taxpayer goes to the taxpayer as reward for his services, and the other half to the city.

It will be observed that the demand is to be made upon the proper officers of the city to bring action "for any money or property belonging to the city"; but the authority of the taxpayer to bring the suit is to bring an action for the recovery of such property or for said penalty. The legislative purpose of these provisions undoubtedly was to provide a sure means for the city to recover property or money unlawfully expended or transferred by its officers at as little loss to the city as possible. Hence it was provided that, where property had been transferred, the taxpayer may bring suit to recover the identical property transferred. This is important, for in many instances a personal judgment for double the value of the property might be worthless; and, by refusal of the proper officers to prosecute the action, authority to the taxpayer to prosecute the action for a money judgment only would afford the city no relief. On the other hand, where the action is to be prosecuted by the taxpayer for a money judgment as for the value of the property or for the amount of money misappropriated, such action must result in loss to the city, in that one-half of the amount recovered goes to the informer as

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his reward. Hence the authority to the taxpayer is to prosecute an action, not for the money misappropriated, but for the penalty provided by section 2, which is double the amount misappropriated or double the value of the property transferred; and, although one-half of the recovery is paid to the taxpayer who has borne the expense of the litigation, the municipality is wholly restored in its loss.

We are of the opinion that the only action authorized to be prosecuted by a taxpayer or taxpayers in the name of the state is for a recovery of the identical property unlawfully transferred; or for double the value thereof; or, where money has been misappropriated, for double the sum misappropriated as the penalty named in section 2 of the act. The facts stated in plaintiffs' petition state a cause of action for recovery of the penalty in double the sum misappropriated, and the petition should be so treated. Actions for the recovery of penalties must be brought within one year after the cause of action accrues. Section 5550, Comp. Laws 1909.

Where a petition upon its face shows that the cause of action set out therein is barred by the statute of limitations, it is proper to sustain a demurrer thereto, urged specially on that ground. *Fox v. Ziehme*, 30 Okla. 673, 120 Pac. 285; *Reeves v. Turner*, 20 Okla. 492, 94 Pac. 543; *Betz v. Wilson*, 17 Okla. 383, 87 Pac. 844. But the second amended petition, to which the demurrer was directed and sustained, does not disclose upon its face that the action is barred. It is not alleged in this amended petition when the money was paid out by the officers. Defendants in error seek to supply this fact in order to render the second amended petition demurrable by asking that certain exhibits attached to the first amended petition be considered. Those exhibits consist of the warrants upon which it is alleged in the first amended petition the money was paid out, and upon the face of which warrants are certain indorsements which defendants in error contend establish the time of the misappropriation of the funds.

But the second amended petition is not made as an amendment to the preceding amended petition, but is made as a substitute and is a complete petition in itself, and contains no reference

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to the prior petitions, or to exhibits thereto attached. The allegations of the first amended petition, except as repeated in the second amended petition, have been abandoned and are out of the case; and the court cannot look to them for the purpose of the demurrer. *State v. Simpkins*, 77 Iowa, 676, 42 N. W. 516; *Long Bros. v. Hubbard*, 6 Kan. App. 878, 50 Pac. 968; *Hawkins v. Massie et al.*, 62 Mo. 552; *McFadden v. Ellsworth Mill & Min. Co.*, 8 Nev. 57; 1 Ency. of Plead. & Pr. 625.

"An amended pleading, filed as a substitute for the original pleading, supersedes it, and the original pleading ceases to be part of the record, except for the purpose of deciding when the action was in fact commenced, and whether a new cause of action has been introduced." (31 Cyc. 465.)

A consideration of some of the questions we have determined could have been obviated, for the reason that they are not essential to a decision in this case, although presented in the brief of counsel either for the plaintiffs in error or defendants in error; but as it is apparent that most, if not all, of them are likely to arise in the subsequent proceeding in this cause, we thought best to consider them.

The judgment of the trial court is reversed, and the cause remanded.

All the Justices concur.

SEMINOLE TOWNSITE CO. v. TOWN OF
SEMINOLE *et al.*

No. 2204. Opinion Filed March 11, 1913.

(130 Pac. 1098.)

1. **MUNICIPAL CORPORATIONS—Ordinances—Presumed Validity.** When a municipality, acting within the scope of its authority, has passed an ordinance, it is presumptively valid; and before a court will be justified in holding it invalid it should be manifest that the discretion imposed on the municipal authorities has been abused by the exercise of the power conferred in an arbitrary manner.
2. **APPEAL AND ERROR—Assignments of Error—Review—Requisites of Briefs.** An assignment of error will not be reviewed, unless that part of rule 25 (20 Okla. xii, 95 Pac. viii) of this

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court is complied with which requires, in effect, that the brief of plaintiff in error shall contain an abstract or abridgment of the transcript, setting forth the material parts of the pleadings, proceedings, facts and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of the questions presented to this court for decision, so that no examination of the record itself need be made in this court.

(Syllabus by the Court.)

Dunn, J., dissenting.

Error from District Court, Seminole County;
Robt. M. Rainey, Judge.

Action by the Seminole Townsite Company against the Town of Seminole and the members of its Board of Trustees and Clerk to enjoin the enforcement of an ordinance providing for the construction of sidewalks in front of various lots owned by plaintiff in a certain town. Judgment for defendants, and plaintiff brings error. Affirmed.

Lydick & Eggerman, for plaintiff in error.

Willmott & Dean, for defendants in error.

KANE, J. This was an action commenced by the plaintiff in error, plaintiff below, against the defendants in error, defendants below, for the purpose of enjoining the enforcement of a certain town ordinance, which provides for the construction of sidewalks in front of various lots owned by the plaintiff in the town of Seminole. The court below granted a temporary injunction, which, upon full hearing, it declined to make permanent, and it is to reverse this action of the court that this proceeding in error was commenced.

Counsel for plaintiff in error contend that the ordinance attacked is void, for the reason that it is unreasonable, oppressive, extortionate, confiscatory, and discriminative, and so indefinite and uncertain as to be incapable of being understood. In answer to this counsel for the defendants in error say:

"We do not dispute that ordinances of such a town, to be valid, must not be unreasonable, oppressive, extortionate, or discriminatory, and must be so definite and certain as to be capable of being understood. The main question here is a question of fact, which was properly before the trial judge on the affidavits

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introduced. That question was: Are the facts and circumstances such at Seminole that a court of equity would be warranted in sweeping aside the act of the board of trustees of the town of Seminole and substituting its judgment in its stead, saying that, under the circumstances, the trustees had acted unreasonably, and that the ordinance was open to the objections urged in the bill?"

Counsel state the salient features of the case with substantial accuracy.

We think there is evidence reasonably tending to support the action of the court below. That being so, this court would not be justified in setting it aside. This well-established general rule is specially applicable to the class of cases now under consideration.

In the case of *Le Feber v. Village of West Allis*, 119 Wis. 608, 97 N. W. 203, 100 Am. St. Rep. 917, the ordinance was attacked on the ground of unreasonableness. The court said:

"It is perfectly well settled in this state, as in most others, that municipal corporations are not completely beyond judicial review and control, even in the exercise of the jurisdiction and discretion delegated to them by the Legislature. True that discretion must and will be accorded broad scope and great deference. The honest judgment of municipal authorities as to what is promotive of the public welfare must ordinarily control, although not in accord with the views of the courts. Nevertheless the delegation of legislative power to subordinate political subdivisions of the state is solely for public purposes, and must be exercised with reference to them. If an act be so remote from every such purpose that no relation thereto can within human reason be discovered, such act must be deemed excluded from the delegation. To that extent, then, courts will inquire into the purpose and policy of municipal conduct, and will hold unauthorized and invalid acts which are wholly unreasonable."

All the authorities called to our attention are to the effect that it requires a clear and distinct case to justify a court in holding an ordinance invalid, when the municipality is acting within the scope of its power. As was said by Duffie, C., in the case of *Peterson v. State*, 79 Neb. 132, 112 N. W. 306, 14 L. R. A. (N. S.) 292, 126 Am. St. Rep. 651:

"It is a general rule that the determination of the question whether or not an ordinance is reasonably necessary for the pro-

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tection of life and property within the city is committed, in the first instance, to the municipal authorities thereof by the Legislature. When they have acted and passed an ordinance, it is presumptively valid; and before a court will be justified in holding their action invalid the unreasonableness or want of necessity of such measure for the public safety and for the protection of life and property should be clearly made to appear. It should be manifest that the discretion imposed on the municipal authorities has been abused by the exercise of the power conferred by acting in an arbitrary manner."

In the case at bar there is the direct evidence of several disinterested witnesses to the effect that the improvements provided for by the ordinance in question are reasonably necessary to a town the size and importance of Seminole. This evidence is clear and convincing; but, even if we were in doubt on the question, we would be inclined to defer to the discretion and judgment of the municipal authorities.

There is an assignment of error to the effect that the ordinance involved is so indefinite and uncertain as to be incapable of being understood, but, as a copy thereof is not set out in the abstract by counsel for either party, as required by rule 25 (20 Okla. xii, 95 Pac. viii), the court cannot pass upon that assignment without an examination of the record itself; and therefore we decline to review it. Rule 25 is to the effect that the brief of plaintiff in error shall contain an abstract or abridgment of the transcript, setting forth the material parts of the pleadings, proceedings, facts, and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of the questions presented to this court for decision, so that no examination of the record itself need be made in this court.

Finding no error in the record, the judgment of the court below is affirmed.

HAYES, C. J., and WILLIAMS and TURNER, JJ., concur; DUNN, J., dissents.

I think it appears beyond doubt that the improvements cost *more than the value of the property*, and hence its requirement is unreasonable. I dissent. DUNN, J.

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No. 2113. Opinion Filed March 11, 1913.

(130 Pac. 1100.)

FORMER DECISION CONTROLLING. Affirmed on the authority of *Seminole Townsite Co. v. Town of Seminole et al.*, ante, 130 Pac. 1098.

(Syllabus by the Court.)

Dunn, J., dissenting.

Error from District Court, Seminole County;
Robt. M. Rainey, Judge.

Action by the Seminole Townsite Company against the Town of Seminole and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Lydick & Eggerman, for plaintiff in error.

Willmott & Dean, for defendants in error.

KANE, J. The questions involved in this case seem to be the same as in *Seminole Townsite Co. v. Town of Seminole et al.*, ante, 130 Pac. 1098. Upon the authority of that case the judgment of the court below is affirmed.

HAYES, C. J., and WILLIAMS and TURNER, JJ., concur; DUNN, J., dissents.

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SPAULDING MFG. CO. v. LOWE.

No. 2207. Opinion Filed March 11, 1913.

(130 Pac. 959.)

1. **SALES—Remedies of Parties—Recovery of Price.** Where an agent for plaintiff, a manufacturing concern, delivered a buggy with a defective wheel to defendant with the understanding at the time that no purchase was made unless a new and perfect wheel was furnished, recovery cannot be had upon the note given for the purchase price, where the wheel was not furnished as agreed, and the buggy was tendered back.
2. **APPEAL AND ERROR—Review—Questions of Fact.** Where controverted questions of fact are submitted to a jury, and there is competent evidence reasonably tending to support every material averment necessary to uphold the verdict, and the trial court in its instructions to the jury fairly states the issues and fixes the burden thereon as the same are presented by the pleadings and evidence, and a verdict is rendered which from all the facts appears to meet the requirements of justice, which is approved by the trial court, and judgment is rendered in accordance therewith, this court will not reverse the order of the trial court denying a motion for a new trial.

(Syllabus by the Court.)

*Error from Beckham County Court;
John C. Hendrix, Judge.*

Action by the Spaulding Manufacturing Company against J. L. Lowe. Judgment for defendant, and plaintiff brings error. Affirmed.

T. R. Wise, for plaintiff in error.

J. A. Minton, for defendant in error.

DUNN, J. This case presents an appeal by the Spaulding Manufacturing Company from an order of the county court of Beckham county denying a motion for new trial and a judgment in favor of the defendant in an action brought by the said company upon a note made in its favor by the defendant. The statement of facts as set forth in the abstract of plaintiff in error shows that on or about October 17, 1907, the plaintiff sold to

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the defendant a secondhand or used buggy, which was sound in every particular except that the front wheel had a spoke or two broken out of it. It was agreed at the time of the sale that the company would replace the defective wheel by shipping the defendant a new one. In payment for the buggy defendant gave his note payable to plaintiff, on the margin of which was written, "Due one front wheel prepaid to Erick, Oklahoma."

The bill of particulars of plaintiff was in the ordinary form of a suit on a note, to which the defendant answered: That, at the time he signed the said note, plaintiff, as a part of its consideration, agreed to deliver to him one front wheel for said buggy, freight prepaid to Erick, Okla. Further, that the note was without a valid consideration for the reason that said buggy was worthless to defendant in its present condition, being a special make of buggy, a Spaulding buggy, and that he had been unable to supply same with a new wheel, and the note was wholly without consideration. That defendant has repeatedly offered to turn said buggy back to plaintiff and asked plaintiff to return his said note, and plaintiff has refused to comply with his part of said contract and refused to return defendant's note to him. Defendant's evidence in chief is set forth by plaintiff in error in its brief as follows:

"That Mr. Newby, agent of the Spaulding Manufacturing Company, brought to defendant's place, in the fall of 1907, a buggy which had a broken wheel, and wanted to sell it to defendant. That defendant told Newby that he did not want the buggy at all; that if he bought a buggy he would want one that would give him some service. That Newby said: 'I'll fix it so that it will be all right. I'll furnish you a new wheel.' That defendant wanted to know when he would send the wheel, and Newby said right away, in about four or five days. That defendant told Newby to take plenty of time, and Newby said that the wheel would be at Erick in two weeks. That defendant answered, 'All right, I will take the buggy under that contract. Understand, now, if that wheel don't come in two weeks, your time, you can come and get the buggy, because I don't consider that I have made any contract for it unless I get the wheel in the time you have specified.' That Newby said, 'It will certainly be there in two weeks.' That defendant went to Erick at the end of the two weeks, but the wheel had not been sent. That about a month

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after he made another demand on another of plaintiff's agents, A. M. Daniel, for the wheel. That at the request of Daniel he consented to keep the buggy two weeks longer on the promise of Daniel that the wheel would be sent within that time. That the plaintiff never furnished the wheel. That defendant made four trips to Erick to get the wheel, using the buggy. That defendant was always ready and willing and able to comply with his part of the contract and to pay the note when it became due, if plaintiff had furnished the wheel as it had promised to do. That defendant tendered the buggy back to plaintiff, the first time, something like a month after he had bought it, when he had the arrangement with Mr. Daniel to hold the buggy another two weeks. That he actually turned the buggy over when he brought it to Erick at the time he was sued on the note in the justice court and left it at Stubb's livery barn when he turned it back to Mr. Wise, the attorney prosecuting the suit. That he wrote two letters to plaintiff about the buggy; the first one about June following the fall that he bought the buggy, and the second letter some time after the fall following the writing of the first letter, before plaintiff had made any demand for payment. That on the 'first one I just wrote them the trade, stated the contract, that I had ordered from the agent, and that he had never complied with it, and I would like to have a wheel or they could come and get the buggy. That was the first letter.' That in the second letter he just wrote that he had their buggy there, and that they had fallen down on their contract and he wanted them to come and get the buggy."

On cross-examination it developed that defendant, while he had held the buggy waiting for plaintiff to furnish the wheel or call for it or indicate disposition, had used it on a number of occasions. The plaintiff asked the court to instruct the jury that if it found that it had promised defendant to deliver him a new wheel and that it failed to deliver the same, but that the buggy in all other respects fulfilled the warranty under which it was bought, that such an agreement was known as a subsidiary promise, and a failure on the part of plaintiff in that respect would not release the defendant from his obligation to pay the note in accordance with its terms, but that he was entitled to an offset for what a new wheel such as plaintiff agreed to furnish was worth. The court instructed the jury that the burden of establishing his defense was upon the defendant, and that a partial

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failure of consideration was not sufficient to defeat the action on the note; but if it found that the defective buggy wheel referred to in defendant's answer was to be replaced in a specific time by a new and perfect wheel, and if it was further found that the failure on the part of plaintiff to furnish the said new wheel at the time specified greatly impaired or destroyed the use of the buggy, and that the defendant, acting upon his right, attempted to or used all of his efforts to rescind his contract and redelivered the buggy back to the company, that it would then be its duty to find for the defendant.

From the testimony of the defendant it is noted that his contract for the buggy contained the condition precedent that he was to have a new wheel, because, as he states in his evidence, "I do not consider that I have made any contract for it unless I get the wheel in the time you have specified." The wheel did not come, and defendant's temporary retention of the buggy was as is seen above, at least as to a part of it, under the solicitation of plaintiff's agent. The buggy was not delivered to the defendant in the city, but at his own home, and he would have been strictly within his rights if he had delivered the buggy to the plaintiff at the place plaintiff delivered it to him. However, the plaintiff, taking no action upon either its failure to provide the wheel as contracted for or to retake, as it had a right to do, and which was in accord with the defendant's wish, brought suit, whereupon defendant brought the buggy to town and delivered it as above set forth. Under these circumstances, in our judgment the verdict of the trial court was correct.

The instructions given by the court fairly presented the issues to the jury, and the rule has been frequently announced by this court that where there is competent evidence reasonably tending to support every material averment necessary to uphold the verdict, and the trial court in its instructions to the jury fully and fairly states the issues and fixes the burden thereon as the same are presented by the pleadings and evidence, and a verdict is rendered which from all the facts appears to meet the requirements of justice, which is approved by the trial court, and judg-

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ment is rendered in accordance therewith, this court will not reverse the order of the trial court denying a motion for new trial.

The judgment of the trial court is, accordingly, affirmed.

All the Justices concur.

ST. LOUIS & S. F. R. CO. v. TATE, *County Treasurer, et al.*

No. 2382. Opinion Filed March 11, 1913.

(130 Pac. 941.)

1. **TOWNSHIPS—Levy of Taxes—Township Board—Budget.** Comp. Laws 1909, secs. 7624-7626, 8730-8735, construed, and held to require the township board of directors to make out an estimate of the amount of money necessary to defray the township expenses during the ensuing year; the same to be attested and filed with the clerk of the county to enable the county commissioners to proceed with the levy.
2. **SCHOOLS AND SCHOOL DISTRICTS—School Tax—Estimate of Expenditures.** Constitution, art. 10, sec. 19, Comp. Laws 1909, secs. 8056, 8093, 8117, construed, and held to require the local legislative body of the school district to distribute the tax voted at the annual school meeting of the district in payment of an estimate of the expenditures authorized to be incurred by Comp. Laws 1909, sec. 8056, and thus show for what purpose the tax was levied, and certify the same to the district clerk.
3. **MUNICIPAL CORPORATIONS—Incorporated Town Tax—Levy—Collection.** Constitution, art. 10, sec. 19, construed, and held to require the board of trustees of an incorporated town, in assessing annual taxes pursuant to Comp. Laws 1909, sec. 847, and in order to specify distinctly the purpose for which said tax is levied, by resolution or order, to adopt an estimate of expenditures and fix a tax levy to raise it and certify the same to the county commissioners, to be by them levied and collected as other taxes.
4. **TAXATION—Excessive Levy—Collection—Injunction.** Where, in certain school districts, towns, and townships, a tax of a certain number of mills, for the purpose of paying their respective estimates of expenses for the ensuing year, was levied when a lesser levy would be more than sufficient to raise the amount necessary to pay said estimates, and where the lesser has been paid, and where the county treasurer and the sheriff are threatening to collect from plaintiff the balance, held that said balance is excessive and illegal, and that it was error to refuse to restrain its collection.

(Syllabus by the Court.)

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*Error from District Court, Noble County;
W. M. Bowles, Judge.*

Suit by the St. Louis & San Francisco Railroad Company against J. B. Tate, as County Treasurer of Noble County, and another. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions.

W. F. Evans and R. A. Kleinschmidt, for plaintiff in error.

H. E. St. Clair, Deputy Co. Atty., for defendants in error.

TURNER, J. This is an action brought by the St. Louis & San Francisco Railroad Company, plaintiff in error, against the county treasurer and the sheriff of Noble county to enjoin the collection of certain taxes which defendants were threatening to collect from said company, assessed against its property for the fiscal year July 1, 1909, to June 30, 1910.

On April 16, 1910, judgment was rendered and entered in favor of defendants, and plaintiff brings the case here. It contends that the taxes levied for that year on its property were excessive in certain school districts, towns and townships in Noble county; that the amount raised therefor exceeded the necessary expense in those taxing jurisdictions, as shown by the estimate of expenses filed by the respective officers thereof. Prior to the suit, plaintiff paid said county all that was exacted, save the sum of \$416.17. The question for us to determine is whether this sum in the aggregate is excessive and void. Taking for example, one of each class of the taxing jurisdictions involved pursuant to the allegations of the petition, the facts disclose:

"As to the town or city of Morrison, the estimate of the amount required to be raised by taxes for the fiscal year in question, as filed with the county clerk, was \$612.06. The levy made was five mills. The total valuation of all property in said town was \$204,046. Therefore, a five-mill levy would produce \$1,020. The valuation of the property of plaintiff in said town was \$23,397."

As to this incorporated town it is claimed:

"* * * That, as a part of the amount of taxes still claimed by said defendant, J. B. Tate, as such county treasurer, to be due from said plaintiff, there is the sum of \$23.40, being a

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levy of one mill for Morrison city, in the county of Noble, state of Oklahoma, which is in excess of the lawful requirements for said Morrison city for the year in question, and said levy so claimed constitutes an illegal and unjust demand, which said Morrison city had no power or authority to make."

The facts further disclose that:

"In Morrison township the estimate of the amount necessary to be raised by taxation was \$1,523.13. The levy was three mills. The total valuation of all property in the township was \$682,860. The levy would therefore raise \$2,046. The total valuation of the property of plaintiff in this township was \$127,332."

As to this township it is claimed:

"That as a part of the amount of taxes still claimed by said defendant, J. B. Tate, as such county treasurer, to be due from said plaintiff, there is the sum of \$63.67, being a levy of five-tenths mills for Morrison township, in the county of Noble, state of Oklahoma, which is in excess of the lawful requirements for said township for the year in question, and said levy so claimed constitutes an illegal and unjust demand, which said township had no power or authority to make."

By plaintiff it is urged that:

"Given the assessed value of property upon which to levy a tax, there are certain provisions of law which are mandatory and must be complied with before a valid levy can be made: (1) It must be ascertained, as required by law, what the actual need of the township, school district, or town is by the officer or officers authorized to ascertain same. It is a judicial prerequisite to a valid levy that the needs of a taxing jurisdiction be thus ascertained and furnished the body making the levy prior to the time the levy is made. (2) The levy must not exceed the constitutional or statutory limit, and should be fixed so as to produce only the necessary expense of the taxing jurisdiction for the ensuing year. The spirit of the Oklahoma law is admittedly that taxing jurisdictions should be required to make an estimate of the amount required for such expenses during the ensuing fiscal year. As regards both townships and school districts, such an estimate is specifically required by law."

In other words, the plaintiff contends that the statute requires that these three classes of taxing jurisdictions shall make an estimate of the amount required annually to defray the expense of the jurisdiction, and that this was done, but that the

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amount raised by the levy was in excess of the estimate, and void as to that excess. On the other hand, it is contended that no such estimate is required; that those filed with the county clerk are *brutum fulmen*; and the levy, being within the constitutional limit, must stand. Plaintiff's contention is the law.

After providing in Comp. Laws 1909, sec. 7625, for making the county levy, the next section provides:

"All levies for cities, towns and townships and school district taxes for the period hereinbefore indicated, shall be made in the manner provided by law on or before the second Monday in July of each year, and shall be certified to the county clerk immediately thereafter, and by him extended upon the tax rolls in the manner provided by law."

After section 8726 makes it the duty of the township board "to levy all taxes for township, road and bridge purposes," and section 8730 defines township charges, section 8731 reads:

"The money necessary to defray the township charges of each township shall be levied on taxable property in each township in the manner prescribed in the general revenue law for state and county purposes"

—which means that such levy is proceeded with by the board of county commissioners in the manner prescribed by section 7625, *supra*, which is based on an estimate. But such estimates are specifically required to be filed by townships.

Comp. Laws 1909, sec. 8735 (Wilson's Rev. & Ann. St. 1903, sec. 6685), reads:

"The township board of directors shall make out an account of the amount of money necessary to defray the township expenses during the next ensuing year; said amount shall be made out not more than sixty nor less than twenty days prior to the meeting of the county commissioners at which the assessment for county purposes is made. Said account shall be signed by the president of the board and attested and filed with the clerk of the county on or before the first day of said session of the county commissioners, who shall cause the same to be placed upon the tax books of said township: Provided, that said expense shall not, together with the amount levied for road purposes and special bridge tax, exceed in any one year one hundred cents on the one hundred dollars valuation."

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This was, in effect, our holding in *Nelson, Sheriff, v. Oklahoma City et al.*, 24 Okla. 617, 104 Pac. 42, on the strength of which we hold that when the statute says, as it does, that the directors of the township shall make out an account of the amount of money necessary to defray the township expense, it means that they shall make a statement or estimate of the amount required annually to defray the expense of that jurisdiction.

The same is true as to school districts. Comp. Laws 1909, sec. 8056, provides:

"The inhabitants qualified to vote at a school meeting lawfully assembled, shall have power * * * to vote annually a tax not exceeding two per cent. on all the taxable property in the district, as the meeting shall deem sufficient for the various school purposes, and distribute the amount as the meeting shall deem proper in the payment of teachers' wages, and to build, hire, or purchase a schoolhouse and to keep it in repair and to furnish the same with necessary fuel and appendages, and to purchase or lease a site: Provided. * * *"

This is, in effect, providing that, when the power granted is exercised, the voter shall distribute the amount as the meeting shall deem proper in the payment of certain expenses, which means that an estimate of those expenses shall be then and there made, and a sufficient amount provided by the levy to pay them. This is required to show the purpose for which the tax was levied.

After this is done, section 8093 provides:

"The district clerk shall within five (5) days report to the county clerk the amount of tax levied at the annual meeting and for what purpose the same was levied. * * *"

Section 8117 provides:

"It shall be the duty of the school district board of the various school districts of the respective counties of the state to cause to be certified by the school district clerk to the county clerk of their respective counties, on or before the twenty-fifth day of August, annually, the aggregate percentage by them levied on the real and personal property in each district, as returned on the assessment roll of the county; and the county clerk is hereby authorized and required to place the same on the tax roll of said county, in a separate column or columns, designating the purpose for which said taxes were levied. * * *"

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—which seems to contemplate that, after the tax has been voted and the estimate adopted by order or resolution of the board, the district clerk shall certify the same to the county clerk.

This method of showing for what purpose the tax was levied has been held sufficient in *McInerney, Sheriff, v. Huelefeld*, 116 Ky. 28, 75 S. W. 237, construing their Constitution, sec. 180, which is identical with ours (Const., art. 10, sec. 19), and provides:

“Every act enacted by the Legislature, and every ordinance and resolution passed by any county, city, town, or municipal board or local legislative body, levying a tax, shall specify distinctly the purpose for which said tax is levied. * * *”

In the syllabus of this case it is said:

“The resolution of the fiscal court of a county levying a tax of 38 cents on the \$100, which recited that it was apportioned as follows: ‘Three cents for the purpose of creating a sinking fund with which to purchase a poorfarm and erect suitable building thereon, ten cents for the maintenance and repair of the public roads and bridges of the county, and 25 cents to defray the general county expenses’—specified the purpose of the levy with sufficient distinctness.”

The same is true of an incorporated town, acting through its board of trustees in imposing an annual tax. Comp. Laws 1909, sec. 847, reads:

“The board of trustees shall have the following powers, viz.: (16) To assess annual taxes not exceeding fifty cents on the one hundred dollars valuation on all property subject by law to taxation within the town and certify the same to the county commissioners to be by them levied and collected as other taxes.”

But in exercising their power the spirit of the law requires that the board comply with Const., art. 10, sec. 19, *supra*, and specify distinctly, as here, by resolution or order, adopting an estimate and fixing a tax levy to raise it, the purpose for which the tax is levied. On this point what we have just said concerning the *McInerney* case is equally applicable here. There, we repeat, it was held that a similar method adopted by the fiscal court was held to comply with the constitutional requirement, and specified the purpose of the levy with sufficient distinctness.

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Morrell Refrigerator Car Co. v. Commonwealth, 128 Ky. 447, 108 S. W. 926, disposes adversely to defendant of his contention that the levy being within the constitutional limit, without more, must stand. There the court in the syllabus said:

"Const. 180, provides that every resolution passed by any county, city, town, etc., levying a tax shall specify the purpose for which the tax is levied. A resolution of the trustees of a school district declared that a property tax of 50 cents on each \$100 worth of taxable property should be levied. *Held*, that the levy was void, as omitting to state the purpose thereof."

We are therefore of opinion that, before the local legislative body of the school district, town, or township here involved can exercise the taxing power under consideration, they must comply with Const., art. 10, sec. 19, and the respective sections of the statute, *supra*, and state directly the purpose for which the tax was levied by an estimate of their respective expenses filed, and that the estimates here filed sufficiently comply therewith.

As the allegations of the petition and the facts disclose that a tax of five mills was levied by the local legislative body for the purpose of paying the estimated expenses of the incorporated town of Morrison, when four mills would be more than sufficient for that purpose, which plaintiff has paid; that five mills was levied by the local legislative body for the purpose of paying the estimated expense of Morrison township, when two and five-tenths mills would have been more than sufficient for that purpose, which plaintiff has paid; that three mills was levied by the local legislative body for the purpose of paying the estimated expense of Watkins township, when two and five-tenths mills would have been more than sufficient for that purpose, which plaintiff has paid; that a tax of five mills was levied by the local legislative body for the purpose of paying the estimated expenses of Warren Valley township, when one and seventy-five one-hundredths mills would be more than sufficient for that purpose, which plaintiff has paid; that a tax of three mills was levied by the local legislative body of school district No. 43 for the purpose of paying the estimated expenses of that district, when two mills would be more than sufficient for that purpose, which plaintiff has paid; that a tax of four mills was levied by the local legislative body

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of school district No. 42 for the purpose of paying the estimated expenses of that district, when two mills would have been more than sufficient for that purpose, which plaintiff has paid; that a tax of three mills was levied by the local legislative body of school district No. 15 for the purpose of paying the estimated expenses of the district, when two mills would have been more than sufficient for that purpose, which plaintiff has paid; and that defendants are threatening to, and will, collect the balance of the tax so levied unless enjoined—the question for us to determine is whether said balance is legally imposed and can its collection be restrained.

In *A., T. & S. F. Ry. Co. v. Wiggins, Treasurer*, 5 Okla. 477, 49 Pac. 1019, it is held that a tax levy, which is clearly in excess of the amount which the board of county commissioners is authorized to levy for a particular purpose, is illegal, and that the remedy is injunction to restrain its threatened enforcement. The court in the syllabus said:

“A petition which alleges facts to show that a tax levy of fourteen mills, for the purpose of paying the salaries of county officers for the ensuing year, was made by the board of county commissioners, when eight mills would be more than sufficient for such purpose, and that plaintiff has paid eight mills of the tax, and that the county treasurer is threatening to collect and will issue his warrant for the collection of the balance of the tax so levied unless enjoined from so doing, states a good cause of action, and it is error to sustain a demurrer to such a petition.”

And in the body of the opinion (5 Okla. 483, 49 Pac. 1020):

“The limit of the levy for the payment of salaries may be much more difficult of ascertainment than for these funds which have prescribed boundaries; but it as surely exists, and that may be said to be where the necessity ceases, when enough has been levied to meet the demand on the fund for the year. It is for that purpose that this public exaction is permitted; and when that has been satisfied, the exercise of the authority is complete. The complete exercise of power furnishes its own limitation upon the authority. When what has been done is all that there has been given authority to do, a limitation is as surely presented as though stated in express language. A clear absence of authority to do an official act has always been held to render the act void”

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—citing *Hurt v. Hamilton*, 25 Kan. 76; *Board of County Commissioners of Osborne County v. Blake*, 25 Kan. 356; *Burlington, etc., Ry. Co. v. Saunders County*, 16 Neb. 123, 19 N. W. 698; *Libby v. Burnham*, 15 Mass. 144; *Appeal of Connors et al.*, 103 Pa. 356; and *Joyner v. School District No. 3*, 3 Cush. (Mass.) 567, where the court said:

“Assuming all other proceedings to have been regular, the excess in the amount of the tax assessed, beyond the sum voted to be raised by the district, would alone vitiate the assessment, and render the tax illegal. Under the vote of the district to raise \$250, the assessors assessed the sum of \$285.01, an amount far exceeding the excess which is allowed by the statute. This is a fatal objection to the validity of the tax.”

When the Wiggins case was again before the court (9 Okla. 118, 59 Pac. 248), in the syllabus it was said:

“By section 3, art. 2, c. 43, Sess. Laws 1895, the board of county commissioners of each county is directed to levy an assessment for each particular fund, including the county salary fund, the respective amounts of which shall be estimated by the board of county commissioners, and they are required to state the amount of revenue necessary to be raised for each fund, and to this amount must be added 25 per cent. thereof to cover delinquencies. This statute fixes a maximum limitation as to the amount of the salaries for the entire year, plus the 25 per cent. additional to cover delinquent taxes; and, where a board of county commissioners makes a levy for an amount greatly in excess of this sum, such excess is illegal, and, upon proper application, the collection thereof will be enjoined.”

See, also, *St. L. & S. F. R. Co. v. Thompson et al.*, ante, 128 Pac. 685.

We are therefore of opinion that the excessive levies complained of in the various taxing jurisdictions, which we have mentioned, are illegal and void, and should be enjoined, and that the lower court erred in refusing so to do. The cause is accordingly reversed and remanded, with directions so to do, and to make the same perpetual.

All the Justices concur.

Tonkawa Nat. Bank v. Dyson et al.

TONKAWA NAT. BANK v. DYSON *et al.*

No. 2398. Opinion Filed March 11, 1913.

(130 Pac. 924.)

FRAUDULENT CONVEYANCES—Creditor's Action—Statutes. Where a daughter received by deed real estate from a parent under a parol agreement that such conveyance was made for the purpose of expediting a sale by the parent, who was about to leave the state, and that the daughter would convey upon such sale's being made, or upon request of the parent, and where no sale was made, but the daughter thereafter by deed reconveyed the property to the parent, such property will not be subjected to the claim of a judgment creditor of the daughter whose judgment was obtained after the agreement had been carried out in good faith by the daughter, merely because, under section 7267, Comp. Laws 1909, she was at liberty to refuse to carry out the parol agreement.

(Syllabus by the Court.)

*Error from District Court, Kay County;
W. M. Bowles, Judge.*

Action by the Tonkawa National Bank against Maud K. Aldrich Dyson and others. Judgment for defendants, and plaintiff brings error. Affirmed.

W. S. Cline and C. L. Pinkham, for plaintiff in error.

John S. Burger, for defendants in error.

HAYES, C. J. Plaintiff in error instituted this action in the court below to obtain a decree of court declaring to be fraudulent and void a certain deed executed by defendants in error F. A. Dyson and his wife, Maud K. Aldrich Dyson, and to set aside and cancel said deed and to have declared that a certain judgment now owned by plaintiff in error constitutes a lien upon the real estate purported to have been conveyed by said deed, and for an order directing the sale of said property to satisfy said lien.

The only specification of error set out in plaintiff's brief with argument and authorities in support thereof in sufficient

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compliance with rule 25 of this court (20 Okla. xii, 95 Pac. viii) to require consideration, is that the trial court committed error in sustaining a demurrer to plaintiff's evidence. The evidence consists wholly of the testimony of defendant in error Maude K. Aldrich Dyson, hereafter referred to as Maud K. Dyson, and of certain exhibits introduced in connection with her testimony. The substantial facts established by this evidence are as follows: Maud K. Dyson is the daughter of her co-defendant, Nancy E. Aldrich. On June 23, 1902, Nancy E. Aldrich was the owner of lot 11 in block 16 in the town of Tonkawa in this state. On this date she and her husband executed to their daughter Maud K. Aldrich a deed. Thereafter their daughter was married to F. A. Dyson, nominal defendant in this action. On January 15, 1906, defendants F. A. Dyson and Maud K. Dyson executed to the Tonkawa State Bank their promissory note for the sum of \$2,500, with interest and attorney's fees, payable 60 days after date. On May 16, 1906, Maud K. Dyson and F. A. Dyson executed and delivered to defendant Nancy E. Aldrich their deed, re-conveying to Nancy E. Aldrich the lot in controversy. This deed was duly filed for record on May 9, 1906. On May 3, 1906, the Tonkawa State Bank instituted an action against Maud K. and F. A. Dyson on the above-named promissory note and reduced same to judgment on the 7th day of December, 1907. Thereafter this judgment was duly assigned by the Tonkawa State Bank to plaintiff in error. Prior to the rendition of this judgment an attachment was sued out by the Tonkawa State Bank and levied upon the lot in controversy; but no judgment of any kind upon this attachment was ever rendered. After judgment upon the note was rendered, an execution was issued and a return thereon made that no goods could be found. The circumstances under which the deed of June 23, 1902, was executed by Nancy E. Aldrich to Maud K. Dyson were that Nancy E. Aldrich and her husband were making preparation to move from the state, and they desired to place the property in controversy, which belonged to Nancy E. Aldrich, in the name of their daughter, who was to remain in the state, in order to facilitate and expedite a sale and conveyance of said property. Maud

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K. Dyson paid no consideration whatever for said property. At the time of the conveyance to her, there was a mortgage upon it for the sum of \$1,000, payments on which have since been paid by Maud K. Dyson. After the death of her father, it was suggested by one of her brothers to Maud K. Dyson that she should reconvey the property to her mother, in order that, if the mother should die, no embarrassment would result in the administration of the estate, and Maud K. Dyson thereupon executed the deed of conveyance to her mother, which recites a consideration of \$2,000, but in fact she received no sum whatever for said conveyance.

By section 7267, Comp. Laws 1909, it is provided that no trust in relation to real property is valid unless created or declared:

"(1) By a written instrument, subscribed by the trustee (trustor) or by his agent thereto authorized by writing; (2) by the instrument under which the trustee claims the estate affected; or (3) by operation of law."

Under this statute and the facts above stated, it is the contention of plaintiff in error that evidence of the parol agreement between the daughter and mother as to the purpose for which the deed to the daughter was made is not competent; and that the reconveyance by the daughter to her mother, without further consideration, was fraudulent as to the creditors of the daughter, Maud K. Dyson. This contention must, we think, both upon authority and sound reason, be overruled. This case does not present a contest between the trustee and the *cestui que trust* for the enforcement of a trust resting in parol. The trust has already been executed by the parties thereto. The effect of plaintiff in error's contention is that the trustee by executing the parol trust committed fraud against him, her judgment creditor, whose judgment and any lien created thereby was not obtained until after the trust had been executed. However void the parol agreement between Maud K. Dyson and her parent might have been, in an action against her by her parents for the enforcement thereof, it was not so far an absolute nullity that the courts will not protect the trustee in the execution of the trust, where

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she has chosen to execute it, and will not, as far as possible, protect her mother, the beneficiary, in the enjoyment of such execution. 1 Perry on Trusts, sec. 76; *Karr v. Washburn et al.*, 56 Wis. 303, 14 N. W. 189. Although there was no contract between Maud K. Dyson and her mother executed in such term prescribed by law that the courts will enforce, it did create a moral obligation upon Maud K. Dyson to convey the land involved upon request of her parents. She, in fact, had no interest in the property whatever; and her creditors cannot complain that she did not retain property which did not belong to her in order that they might subject it to the payment of her debts to them.

In an early and leading case upon this question, it was said:

"A debtor will not be permitted to convey away his property, either real or personal, and relieve it from the incumbrances occasioned by his debts; but there is nothing to prevent his restoring to others their property, if it has been placed in his hands; nor is there any reason why the property of others should be subjected to the payment of his debts, if he is honest enough to refuse to avail himself of an opportunity to use it for that purpose." (*Sieman v. Austin et al.*, 33 Barb. [N. Y.] 9.)

Evidence of the parol agreement between Maud K. Dyson and her parents was not introduced for the purpose of enforcing the trust, but to establish the facts surrounding the transaction by which she conveyed the property back to her mother and to establish that it was not conveyed in fraud of creditors. That it was competent for this purpose, the authorities sustain. *Richmond v. Bloch*, 36 Ore. 590, 60 Pac. 385; *Desmond v. Myers*, 113 Mich. 437, 71 N. W. 877; *Farnham v. Kennedy*, 28 Minn. 365, 10 N. W. 20; *Gallman v. Perrie et al.*, 47 Miss. 131.

The judgment of the trial court is affirmed.

KANE, DUNN, and TURNER, JJ., concur; WILLIAMS, J., not participating.

Perry Public Library Ass'n et al. v. Lobsitz et al.

PERRY PUBLIC LIBRARY ASS'N *et al.* v. LOBSITZ *et al.*

No. 2410. Opinion Filed March 11, 1913.

(130 Pac. 919.)

1. **APPEAL AND ERROR—Orders Appealable—Temporary Injunction—Denial.** By reason of section 6067, Comp. Laws 1909, an order which refuses a temporary injunction may be reviewed by the Supreme Court on appeal.
2. **MUNICIPAL CORPORATIONS—Public Libraries—Trusts—Enforcement—Taxpayer's Action.** A donor offered to an incorporated city of the first class the sum of \$10,000 with which to construct a free public library upon condition that the city council by resolution would bind the city to furnish a site for said building and maintain said free public library at a cost of not less than \$1,000 per year. The city council by resolution accepted the donation and agreed to comply with the terms thereof by providing a site and by levying an annual tax upon the taxable property of the city sufficient in amount to maintain a free public library in said building at a cost of not less than \$1,000 per year. The building was thereupon constructed in accordance with the plans and specifications approved by the donor, and the cost thereof paid by the donor in the sum of \$10,000. Thereupon a library consisting of 1,300 volumes was placed in said building, and the building and its rooms were occupied as designed in the plans and specifications according to which it was constructed. After all these things had occurred, the city council was proceeding to take charge of said building and to establish therein the offices of the city, including the office of the mayor, city clerk, police judge, chambers of the city council, and authorized the use of a portion of said building for commercial club purposes and for public conventions. **Held**, that the title to said building was not absolute in the city free of any conditions and restrictions, but that the city's title to same is that of a trustee; and that it holds same for the benefit of the public; and that a court of equity has jurisdiction to compel the execution of the trust in compliance with the terms of the gift; and that the action of the officers of the city in attempting to divert the building or a portion thereof to the above-named uses may be enjoined at the suit of resident taxpayers of the city and beneficiaries of the trust.

(Syllabus by the Court.)

*Error from District Court, Noble County;**W. M. Bowles, Judge.*

Suit by the Perry Public Library Association and others against James Lobsitz and others. Judgment for defendants, and plaintiffs bring error. Reversed and remanded.

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H. A. Smith, Henry S. Johnston, and P. W. Cress, for plaintiffs in error.

Chas. R. Bostick, for defendants in error.

HAYES, C. J. This action was originally instituted in the district court of Noble county by the Perry Public Library Association and a large number of taxpayers against James Lobnitz, the mayor of the city of Perry, and the other defendants in error, who constitute the officers of said city, including its city council. Plaintiffs seek by their action to secure an injunction, enjoining defendants, as the officers of the city of Perry, from moving into a certain building in that city, known as the Carnegie Library building, and from establishing the city offices therein, and to enjoin defendants from occupying said building in any way, other than for the purposes for which it was erected, to wit, a free public library. On the 9th day of February, 1911, plaintiffs were granted by the judge of the district court of Noble county a temporary restraining order. At the same time, their petition for temporary injunction was set for hearing by the judge before him on the 11th day of the same month. When the petition for a temporary injunction was presented, evidence was introduced by plaintiffs in support thereof and by defendants in opposition. Whereupon the judge made an order denying to plaintiffs the temporary injunction and dissolving and setting aside the restraining order theretofore granted. It is from this order that the appeal is prosecuted.

Counsel for defendants, at the outset, contend that the order is not such a one as may be reviewed upon appeal. This contention is answered in the negative by the statute. Section 6067, Comp. Laws 1909, in part provides:

"The Supreme Court may also reverse, vacate or modify any of the following orders of the district court, or the judge thereof: (1) A final order. (2) An order that grants or refuses a continuance, discharges, vacates or modifies provisional remedies, or grants or refuses to vacate or modify an injunction."

The order here involved refuses a temporary injunction, and is, we think, clearly made appealable by the foregoing statute.

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It is next urged that the granting or refusal of a temporary injunction is a matter resting largely within the discretion of the trial court or judge, and such an order will not be reversed by this court, except for an abuse of discretion. This contention correctly states the rule in this jurisdiction. *Reaves v Oliver*, 3 Okla. 62, 41 Pac. 353. But when it appears by the petition that plaintiffs are entitled to the relief demanded and such relief or any part thereof consists in restraining the commission or continuance of some act, the commission or omission of which will produce injury to the plaintiffs, a temporary injunction may be granted to restrain such act (section 5756, Comp. Laws 1909); and where only questions of law are presented by the bill upon its face, or by the evidence, errors of the court or judge relative thereto are an abuse of discretion which the appellate courts will review and correct (High on Injunct. [4th Ed.] sec. 1696). The allegations of the petition are supported by the evidence, and there is no material conflict between the evidence introduced on behalf of plaintiffs and the evidence introduced on behalf of defendants. The facts alleged in the petition and established by the evidence are, substantially, as follows:

In the early part of January, 1909, one of the plaintiffs in error wrote to Mr. Andrew Carnegie, soliciting from him a gift of a sum of money to the city of Perry for the purpose of erecting a library building and establishing a free public library. In answer thereto, Mr. Carnegie submitted a proposition that, if the city would agree by resolution of its council to maintain a free public library at a cost of not less than \$1,000 a year and provide a site for a building, he would give \$10,000 with which to erect a free public library building in the city of Perry. On the 2nd day of February, 1909, the city council adopted a resolution in response to the proposition of Mr. Carnegie. This resolution proved unsatisfactory to Mr. Carnegie, and on March 19, 1909, the city council adopted the following resolution:

"Resolution. To accept the donation of Andrew Carnegie.

"Whereas, Andrew Carnegie has agreed to furnish ten thousand dollars to the city of Perry, Oklahoma, to erect a free public library building, on condition that said city shall pledge itself by resolution of council to support a free public library, at

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a cost of not less than one thousand dollars a year, and provide a suitable site for said building; now therefore, be it resolved by the council of the City of Perry, Oklahoma, that said city accepts said donation and it does hereby pledge itself to comply with the requirements of said Andrew Carnegie. Resolved that it will furnish a suitable site for said building and will maintain a free public library in said building when accepted. At a cost of not less than one thousand dollars a year. Resolved that an annual levy shall hereafter be made upon the taxable property of said city sufficient in amount to comply with the above requirements."

This resolution was approved by Mr. Carnegie. Plans and specifications for the building were drawn by the city council, showing the different rooms into which the building was to be divided and the use for which they were designed. After these plans and specifications had been approved by Mr. Carnegie, he authorized the city to proceed with the construction of the building and promised that he would pay therefor as the work progressed upon the certificate of the architect. The site was accordingly furnished by the city and the building constructed and paid for by Mr. Carnegie. After its completion, a library, consisting of about 1,300 volumes, that had theretofore been accumulated by the Perry Public Library Association, a voluntary association of the citizens of Perry, organized for the purpose of collecting a library, was placed in the building, and the building and each of its rooms are now occupied as designed in the plans and specifications submitted to Mr. Carnegie. The evidence establishes that a small levy was made by the city for the year preceding the completion of the building, and that, while no levy has been made by the city council for the current year in which this action is brought, it is the intention of the council to make such levy in accordance with its resolution and acceptance of the donation. All the evidence is to the effect that it is the intention of the city council to use the library as a city hall; to establish therein the office of the mayor, the clerk, the chambers of the city council, and the office of police judge; and, in addition thereto, to use a portion of said building for commercial club purposes and as a general convention hall. The testimony on behalf of the defendants is that they do not intend to use the entire build-

ing in this manner, and that they intend to maintain a library therein, and that it is not their intention to disturb or interfere with the library; but the evidence on behalf of plaintiffs, on the other hand, is that, in passing to the portions of the building intended to be used by the city council for the purpose of the city, the visitors and officers must pass through the rooms used for reading and sitting rooms to the library.

The effect of the donation by Mr. Carnegie to the city is not to make the city the owner of the library building without any restrictions upon its title or the use to which it may be put. The effect of his agreement with the city is to vest this property in the city as trustee for the benefit of the public, and the city holds this property as a trust, which it must administer in accordance with the terms of the trust. The power of the city of Perry as a municipal corporation to accept the donation of Mr. Carnegie with the restrictions imposed thereon has not been questioned by any of the parties to this proceeding; and the doctrine generally supported by the American courts is that, in the absence of disabling or restraining statutes, municipal corporations may take and hold property in trust for purposes not foreign to their institutions, or incompatible with the objects of their organization, and legacies of personal property directly to the corporation for benevolent or public purposes are valid in law. *Dillon on Municip. Corp.* (5th Ed.) sec. 988.

It is also well settled that as to all property or funds held by a municipal corporation in trust, equity, by virtue of its jurisdiction in respect of trusts and trust property, may assert its power to compel the observance of the trust and the discharge by the municipal corporation of its public duties in respect to the subject of the trust. *Dillon on Municip. Corp.* sec. 1574.

Counsel for defendants in error rest their contention that the municipal officers have authority in the premises to say for what purposes the building may be used upon sections 664 and 690, *Comp. Laws 1909*. The statutes cited vest in the mayor and council the care, management, and control of the city and its finances, and also authorizes the council to provide for the erection and government of any and all necessary buildings for the city.

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Authorities have been cited which hold that buildings erected for public purposes by municipal corporations may by the proper authorities be allowed to be used incidentally for other purposes either gratuitously or for compensation. Among the cases cited are *Bates v. Bassett*, 60 Vt. 530, 15 Atl. 200, 1 L. R. A. 166; *Bell v. City of Platteville*, 71 Wis. 139, 36 N. W. 831. But we do not regard that either of these cases or cases of similar character are in point, for the reason that they turn upon statutes vesting the municipal authorities with power to control buildings constructed by the municipal corporations out of funds derived from the public revenue, the title to which and the control thereof is absolute in the municipal corporations, subject, of course, to such limitations as the statutes may impose. In the case at bar the title of the municipal corporation to the library is not absolute. In accepting the gift from the donor, the city took it with the obligation and limitations imposed by the donor, which were that the same should be a free public library, and that the city should furnish annually not less than \$1,000 for the support and maintenance thereof.

In *Warren v. Mayor of Lyons City*, 22 Iowa, 351, an owner of land had in 1840 granted to the city a tract of land for a public square. In 1846, the Legislature passed an act authorizing incorporated towns and cities to acquire, hold, improve, and dispose of lands for public squares, parks, commons, and cemeteries. The city subdivided the land theretofore dedicated for a public square into lots and was about to sell same. In enjoining the city from so doing, the court said in the opinion:

"If the Legislature should undertake to authorize an individual to use and appropriate property for a purpose violative of the terms and conditions upon which it was held, no one would be found to claim that such legislative act did not impair and interfere with the obligation of the contract. And why, we ask, is not the like rule applicable, and the like good faith required, as between a corporation, representing the public, and an individual? Why may I not affix the terms, designate the uses and purposes upon and for which I give to the public my farm or my lots? And upon what principle of law or morals is it that the Legislature can say that this property may at the option of the trustee, be used for another and different purpose? 'A.' dedicates

his ground for school purposes, for instance. The corporation, deeming some other place better suited to the object indicated, turns the dedicated property over to fishmongers, and tallow-candlers, or, if you please, to merchant princes, and wealthy householders, defiantly saying, 'You no longer have any interest in this property, but we can misuse the same without limit, and you cannot complain.' Such a doctrine would enable the state at pleasure to trifle with the rights of individuals, and we can scarcely conceive of a doctrine which would more effectively check every disposition to give for public or charitable purposes."

Cary Library v. Bliss, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765, involves a state of facts somewhat similar to the facts involved in the case at bar. The donor had given to the city of Lexington a gift of \$1,000, in accordance with the terms of a letter which provided that her gift should go to the inhabitants of the town to be held by the board of trustees, consisting of the selectmen and the school committee of the town for the time being and the settled ministers of the place. Her scheme contemplated the establishment of a public library for the benefit of the city, to be supported in part by the income from the fund furnished by her and in part by money supplied by the town. Her letter required the town as a condition precedent to receiving the gift to vote to establish a free public library and to provide a sum of money toward the settlement and support of it. The library was established and the donor made the original gift, which was followed later by other gifts from her, and the library was maintained for a time in compliance with the conditions of the gift. Later the Legislature passed an act which authorized the city to transfer to a corporation all the funds and property held by the city for the purpose of a library; such corporation to take and hold said property under the terms of the donor, and to administer it in the same manner it had been administered by the city. The court held that the statute undertook materially to change the execution of the trust, and it was therefore void. In the opinion it is said:

"The acceptance by the town of Maria Cary's proposition contained in her letter created a contract, which was executed on her part by the payment of the money, and which continued binding on the town and the trustees as to their conduct in reference to the charity."

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It is fundamental that if a grant is made for a specific, limited, and defined purpose, the subject of the grant cannot be used for another purpose; and a diversion of the subject of the trust from the purposes for which the trust was created may be enjoined. *Warren v. Mayor of Lyons City*, *supra*; *Church v. City of Portland*, 18 Ore. 73, 22 Pac. 528, 6 L. R. A. 259; *Barnum et al. v Mayor & City Council of Baltimore*, 62 Md. 275, 50 Am. Rep. 219. Defendants attempt to justify their taking charge of a portion of the building for city hall purposes with the contention that the library may be maintained in a part of the building, without the use of the whole of it for that purpose; but we do not understand that the fact that the *cestui que trust* may not be in absolute need of the benefits of the trust ever authorizes the trustee to convert the trust or a portion thereof to his own use. For the same reason, upon receipt of the gift the municipal authorities might have said that a \$5,000 building would prove fully adequate for a public library, and devoted the other \$5,000 to building a separate building for a city hall. But a statement of this contention demonstrates its unsoundness. By accepting the gift, the city bound itself to levy each year the sum of \$1,000 with which to keep up and support the free public library. It cannot levy and collect this sum of money and expend a part thereof in keeping up the library and a part in maintaining the library as a city hall for the accommodation of its officers and of private or public organizations, such as commercial clubs, without a misappropriation of the funds so levied and a violation of the trust; and, to prevent their doing so, they may be enjoined at the suit of the taxpayers of the city and beneficiaries of the trust. *Kellogg v. School Dist. No. 10, Comanche Co.*, 13 Okla. 285, 74 Pac. 110; *Marlow et al. v. School Dist. No. 4, Murray Co., et al.*, 29 Okla. 304, 116 Pac. 797; *Sexton v. Smith et al.*, 32 Okla. 441, 122 Pac. 686.

The order of the court below is reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

KANE, DUNN, and TURNER, JJ., concur; WILLIAMS, J., not participating.

Carson v. Vance.

CARSON v. VANCE.

No. 2414. Opinion Filed March 11, 1913.

(130 Pac. 946.)

1. **BROKERS—Compensation—Performance of Contract.**—A real estate agent authorized to sell land for another for a stated price for a certain compensation has earned his commission when he produces a purchaser ready, willing, and financially able to purchase the land upon the terms and conditions agreed upon.
2. **APPEAL AND ERROR — Review — Amendments Regarded as Made.** Where, in an action for his commission on a sale of land, plaintiff declares upon an express contract to pay him five per cent. therefor, and evidence is introduced without objection in effect that such commission is usual and customary, held, that the pleading is presumed to be amended so as to conform to the proof, that an instruction submitting to the jury the question of what is a reasonable commission is proper, and that the same having been found to be five per cent. will not be disturbed.

(Syllabus by the Court.)

*Error from Oklahoma County Court;
Sam Hooker, Judge.*

Action by Asa J. Vance against Mary C. Carson. From a judgment for plaintiff, defendant brings error. Affirmed.

Burwell, Crockett & Johnson, for plaintiff in error.

Everest, Smith & Campbell, for defendant in error.

TURNER, J. This action was commenced by Asa J. Vance, defendant in error, against Mary C. Carson, plaintiff in error, before a justice of the peace in Oklahoma City, to recover a commission on a sale of real estate. From a judgment for plaintiff, defendant appealed to the county court, and from a judgment against her there, to this court. The bill of particulars upon which the case was tried in the county court states:

"* * * That the plaintiff was an agent and broker engaged in the selling of real estate upon commission. That on or about the 19th day of March the defendant listed with the plaintiff lots 9 and 10, block 6, in the Northwest addition to Oklahoma City, and promised and agreed to pay to the plaintiff five per

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cent. of such price as plaintiff might obtain for her. That the plaintiff procured a purchaser for the said real estate, who was then and there willing, ready, and able to purchase the same at and for the sum of \$2,000, which price and terms of sale were acceptable to and were agreed to by the said Mary C. Carson. Wherefore, the plaintiff prayed judgment for the sum of \$100."

As the evidence, in that it shows that plaintiff, pursuant to his contract, produced a purchaser who was ready, willing, and financially able to make the purchase at the price and upon the terms fixed by defendant, reasonably tends to support the verdict, the judgment will not be disturbed. It discloses that in the early part of the year 1909 plaintiff was a resident of and engaged in the real estate business in Oklahoma City; that defendant was a resident of Omaha, Neb., and the owner of the lots described in the bill of particulars; that about that time several letters were exchanged between plaintiff and defendant with reference to a sale of the property by plaintiff for a commission; that about the middle of March she came to see plaintiff, and talked with him about the sale of the property, and listed the same with him for sale with no understanding as to his commission; that, after making several ineffectual efforts to sell, he finally succeeded in getting an offer from a Mr. Henley for \$2,000, one-half cash and the balance payable in six and twelve months, secured by a mortgage on the lots, with interest, which she refused to accept, insisting on \$2,000 cash. Later she again called at the office of plaintiff, at which time he called Henley up over the telephone, and after some talk with him, which plaintiff then and there repeated to defendant, the minds of Henley and defendant met, and she agreed to accept his offer of \$2,000, to be paid \$1,000 cash when the papers were signed, \$800 as soon thereafter as certain notes of the purchaser, whose discount in bank had been arranged for, could be cashed, and \$200 payable in 60 days, evidenced by Henley's notes payable to her; that, as soon as this contract was made, defendant told plaintiff to get Henley's check, and that she would meet him again there at his office at two o'clock that afternoon, and execute the necessary papers; that plaintiff did as she requested, and got check for \$500, and met plaintiff as appointed, whereupon she refused to be bound, stating that she

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had sold the property to another for \$2,000 cash, and, refusing to pay the commission, plaintiff brought this suit.

The testimony further discloses that Henley was ready, willing, and financially able to buy, and would have done so, had defendant stood by her contract; that the usual and customary commission was five per cent., or \$100, as allowed by the jury. This case is governed by the law laid down by us in *Birch v. McNaught*, 23 Okla. 634, 101 Pac. 1049, where in the syllabus we said:

"To entitle McNaught to recover, the burden of proof was upon him to show that he had found and produced a purchaser who was ready, willing, and financially able to make the purchase of the property at the price, and within the time, and upon the terms fixed by Birch."

This for the reason that such was all the agent undertook to do.

"The general rule is that, in order for a real estate broker to be entitled to compensation or commission, he must have performed his full duty towards his employer, and have accomplished all he undertook to do." (23 Am. & Eng. Enc. Law, 914.)

We are therefore of the opinion that plaintiff is entitled to recover—that is, unless there is merit in defendant's next contention, which is:

"That evidence nowhere discloses that there was ever any promise or agreement upon the part of the defendant to pay a commission of five per cent. The plaintiff himself makes no attempt to prove that there was such an agreement. The only attempt to prove the amount of compensation to be allowed was when, after the instructions had been given to the jury, he obtained leave to reopen the case, and put Mr. Vance on the stand, who testified that the usual customary commission for the sale of real estate during the month of March, 1909, in Oklahoma City, was five per cent. He did not testify that five per cent. was a reasonable commission, but only that it was the usual and customary commission."

All of which is true, and from which defendant contends that:

"Even though under the pleadings the instruction given was permissible, the evidence offered or produced by the plaintiff wholly fails to establish what a reasonable commission is."

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The instruction complained of reads:

"Now if the plaintiff establishes this, as stated, he is entitled to recover whatever you believe is a reasonable commission for his services performed in the matter, not to exceed the amount sued for in this case, to wit, \$100."

While the bill of particulars declares upon an express promise to pay plaintiff five per cent. commission, and the proof fails as to that allegation, yet as the evidence introduced without objection, proves that such a per cent. was usual and customary, the pleading is presumed amended so as to conform to the proof and to justify the instruction. *St. Paul, etc., Ins. Co. v. Griffin*, 33 Okla. 178, 124 Pac. 300. That being true, what we said in *Roberts v. Markham*, 26 Okla. 387, 109 Pac. 127, disposes of this point:

"It is contended by plaintiff in error that there was no evidence tending to establish the amount of the agent's compensation by contract. If there was evidence tending to show an express implied contract as to the agency, and no agreement as to the amount of compensation, there being evidence introduced without objection as to the reasonable or customary value of such compensation, such evidence would be sufficient to sustain the finding of the court."

Finding no error in the record, the judgment is affirmed.

HAYES, C. J., and KANE and DUNN, JJ., concur; WILLIAMS, J., absent, and not participating.

Shull v. State et al.

SHULL v. STATE *et al.*

No. 2421. Opinion Filed March 11, 1913.

(130 Pac. 910.)

COURTS—Supreme Court—Tax Proceedings—Appeal from Judgment Affirming County Treasurer's Order Assessing Omitted Property. Appeal dismissed for want of jurisdiction, on the authority of *State et al. v. Cawthorn's Estate*, 31 Okla. 560, 122 Pac. 522.

(Syllabus by the Court.)

Error from Custer County Court;
A. H. Latimer, Judge.

Action by the State and Custer County against Mary E. Shull. Judgment for plaintiffs, and defendant brings error. Dismissed.

R. J. Shive, for plaintiff in error.

Charles West, Atty. Gen., and *W. C. Reeves*, Asst. Atty. Gen., for defendants in error.

KANE, J. This is an appeal from an order of the county court of Custer county, dismissing an appeal from the final action of the treasurer of that county, finding that certain personal property belonging to the plaintiff in error had been unlawfully omitted from the tax returns for certain years.

In *State et al. v. Cawthorn's Estate*, 31 Okla. 560, 122 Pac. 522, it was held that "the Supreme Court is without jurisdiction to review, on appeal thereto, an order or judgment of a county court made in an appeal to such court from a decision and order of a county treasurer, assessing property for taxation, alleged to have been unlawfully omitted from the tax returns for certain years."

On the authority of the foregoing case, the appeal must be dismissed for want of jurisdiction.

WILLIAMS, DUNN and TURNER, JJ., concur; HAYES, C. J., absent, and not participating.

ST. LOUIS & S. F. R. CO. v. BILBY.

No. 2430. Opinion Filed March 11, 1913.

(130 Pac. 1089.)

1. **CARRIERS—Commerce—Transportation of Live Stock—Interstate Shipments—Limited Liability—State Regulations.** On account of the passage of the Act of Congress of June 29, 1906, c. 3591, 34 St. at L. 584 (U. S. Comp. St. Supp. 1911, p. 1284), the state, under its police power, has ceased to have the authority to pass acts relative to contracts made by carriers pertaining to interstate shipments, and section 9 of article 23 (section 358, Williams' Ann. Const. Okla.) of the Constitution of this state applies only to intrastate shipments (following **Adams Express Co. v. Croninger**, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. —, decided by the Supreme Court of the United States on January 6, 1913).

(a) As to interstate shipments, the common-law liability of the carrier for the safe carriage of property may be limited by a special contract with the shipper, where such contract, being supported by a consideration, is reasonable and fairly entered into by the shipper, and does not attempt to cover losses caused by the negligence or misconduct of the carrier (following **Adams Express Co. v. Croninger**, *supra*).

(b) As to intrastate shipments, only such contracts as are made between the carrier and the shipper pursuant to rules and regulations adopted by the Corporation Commission of this state are valid.

(c) All contracts or bills of lading made or issued by carriers as to intrastate shipments, which are inconsistent with the rates, charges, classifications, rules, and regulations adopted by the Corporation Commission of this state, are void.

2. **APPEAL AND ERROR—Carriers—Evidence—Trial—Transportation of Live Stock—Damages—Issues—Instructions.** The petition claimed, as one of the grounds for damages, "rough and indifferent handling," by which the "cattle were badly bruised." Over the objection of the defendant (plaintiff in error), the plaintiff (defendant in error) was permitted to prove that the cattle were badly bruised, which was caused by being lugged about in the cars and jammed against the sides of the cars and ends of the same. **Held**, not to be reversible error under the issues as framed.

(a) To lay a foundation for the admission of evidence as to the value or damage to cattle, it is sufficient to show that the witness' knowledge was that of a cattle raiser or dealer, and by pricing the same at the time the cattle alleged to have been damaged were placed on the market; the witness stating that he knew the market price. The weight of the opinion or statement as to such price then given is for the jury.

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(b) The Live Stock Reporter, which was sought to be introduced in evidence in order to show the market quotations of cattle, neither having been made a part of the record nor the part thereof specially sought to be introduced, this court, on review, is unable to determine whether any error prejudicial to the right of the plaintiff in error was committed, and, under such circumstances, the alleged error cannot be considered on review here.

(c) Although the instruction which was asked on the part of the plaintiff in error, but refused by the trial court, may correctly define the law applicable to the issue or issues in the case, yet, if the subject upon which the instruction was requested is fully covered in the general charge, no reversible error will operate on account of the refusal of the trial court to give same.

(Syllabus by the Court.)

*Error from Hughes County Court;
P. W. Gardner, Judge.*

Action by N. V. Bilby against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. F. Evans, R. A. Kleinschmidt, and E. H. Foster, for plaintiff in error.

Lewis C. Lawson, for defendant in error.

WILLIAMS, J. This proceeding in error was commenced to review the judgment of the trial court, wherein the defendant in error, as plaintiff, had sued the plaintiff in error, as defendant, to recover damages on a certain shipment of cattle delivered to the railroad company at Holdenville, Okla., on April 6, 1909, to be delivered by said carrier at the National Stock Yards, Ill.

For convenience, in this opinion the plaintiff will be referred to as shipper, and the defendant as carrier.

The carrier answered by general denial, and further as follows:

"Defendant admits that on April 6, 1909, it received a shipment of cattle from the plaintiff for transportation from Holdenville, Okla., to National Stock Yards, Ill., but avers that at said time this defendant had two rates for the transportation of live stock, to wit, a rate at carrier's risk and a reduced rate under a contract limiting the liability of the carrier, and that plaintiff had the option of shipping said stock at either of said rates:

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that plaintiff elected to ship said cattle at the reduced rate, and requested, in writing, the transportation of said cattle at such reduced rate under the terms of a contract limiting the liability of the carrier; that said contract, among other things, provided: 'That shipper acknowledges that he has had the option of shipping the live stock at carrier's risk at a higher rate, or under this contract at a lower rate, and that he has elected to make this contract and accept the lower rate. The evidence that the shipper, after a full understanding hereof, agrees to this contract and all the limitations and provisions herein contained is his signature hereto.'

"The defendant agreed to transport said cattle under the terms of said contract limiting the liability of the carrier; said written contract providing for the transportation of said cattle was duly executed by plaintiff and defendant, and a copy of the same is hereto attached and for certainty marked Exhibit A and made a part of this answer.

"Defendant avers that it is provided in said contract as follows: '(a) Live stock is not to be transported or delivered within any specified time, nor in season for any particular market. The company shall not be liable for delay caused by storms, rains, failure of engines, cars, or machinery, obstructions to the track, or from any cause whatever.'

"Defendant further avers that it is provided in said contract as follows: '(b) The company shall not be responsible for any death, loss, or injuries sustained by the live stock from any defect in the cars, overloading of cars, escaping of live stock, or because the live stock are wild, unruly, or weak, or maiming each other or themselves, or from fright, crowding, heat, or suffocation. (c) No agent of this company has authority to waive, modify, or amend any limitation or provision of this contract, or to furnish any special kind of cars, or to furnish cars at any fixed time, or to agree to transport the live stock by any certain train, or within any fixed time, or to reach any particular market, which the company hereby expressly declines to do.'

"And this defendant avers that said cattle were transported to National Stock Yards, Ill., in the ordinary and usual course of transportation, and defendant further avers that, under the terms of said contract, it is only required to transport said cattle by its regular freight trains, and by its first trains moving toward the point of destination, which defendant avers it did.

"Defendant avers that it was provided in said contract executed for the consideration above mentioned as follows: '(d) As a condition precedent to recovery of damages for any death,

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loss, injury, or delay of the live stock, the shipper shall give notice in writing of his claim to some general officer of the company or the nearest station agent or the agent at destination, and before the live stock is mingled with other live stock, and within one day after its delivery at destination, so that the claim may be promptly and fully investigated, and a failure to comply with this condition shall be a bar to the recovery of any damages for such death, loss, injury, or delay.'

"And defendant avers that said plaintiff wholly failed to give any notice of any claim for injury to such stock to any of the persons mentioned in said contract within one day after the delivery of said stock at its destination, and before said stock was mingled with other live stock, and defendant believes such failure on the part of the plaintiff is a bar to any recovery in this action."

Afterwards an amendment was filed by the shipper to his original petition, by which he claimed the additional sum of \$214.60 by reason of the depreciation in the price of the cattle on account of the delay in shipment.

The shipper demurred to the portion of the answer hereinbefore set out, which is referred to as paragraph 2. The order of the court thereon is as follows:

"The court sustains the demurrer of the plaintiff to so much of the second paragraph of the defendant's answer as seeks to make the company not liable for failure of engines, class of machinery, obstructions to the track, or for any cause whatever; the court sustains the demurrer of plaintiff to so much of the second paragraph of defendant's answer as seeks to make it a condition precedent to the recovery of damages for any death, loss, or injury or delay of live stock, that notice in writing of such claim should be given within one day after its delivery at destination; the limitation being regarded by the court as not reasonable, to which the defendant excepts."

In due time the shipper filed a reply denying:

" * * * That, at the time of the shipment mentioned in plaintiff's petition, the plaintiff was offered his option by defendant of shipping said cattle at a rate at carrier's risk, or a reduced rate under a contract limiting the liability of the carrier. Plaintiff admits signing a bill of lading, but says that he did not have time or opportunity to read same, and that he was not acquainted with the contents of same, and that he was not told by the agent of the defendant that there were provisions in said bill

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of lading, seeking to limit defendant's liability. Plaintiff further says that, when he signed said bill of lading, he did not know, nor was he advised, that there was a provision requiring him to give notice of damage or injury within one day, and that said provision is unreasonable; but plaintiff avers that he did give notice to defendant of the said injury at the earliest possible moment; that said notice was given, as plaintiff believes, within one day from the arrival of said stock at its destination."

This was an interstate shipment, and the question arises as to the validity of the provision requiring notice within one day after the delivery of said cattle as a condition precedent to recovery.

Section 9, art. 23 (section 358, Williams' Ann. Const. Okla.), of the Constitution of this state, is as follows:

"Any provision of any contract or agreement, express or implied, stipulating for notice or demand other than such as may be provided by law, as a condition precedent to establish any claim, demand, or liability, shall be null and void."

Unless the state, by action of Congress, has ceased to have jurisdiction of such matters as to interstate shipments, this provision applies and renders the provision of the bill of lading for such notice void. *Western Union Telegraph Co. v. Crawford*, 29 Okla. 143, 116 Pac. 925, 35 L. R. A. (N. S.) 930; *Gray v. Reliable Ins. Co.*, 26 Okla. 592, 110 Pac. 728.

In *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. —, decided by the Supreme Court of the United States on January 6, 1913, in an opinion by Mr. Justice Lurton, it is said:

"The answer relies upon the Act of Congress of June 29, 1906 [34 St. at L. 584, c. 3591 (U. S. Comp. St. Supp. 1911, p. 1284)], being an act to amend the Interstate Commerce Act of 1887 [Act Feb. 4, 1887, c. 104, 24 St. at L. 379 (U. S. Comp. St. 1901, p. 3154)], as the only regulation applicable to an interstate shipment, and avers that the limitation of value, declared in its bill of lading, was valid and obligatory under that act. This defense was denied. This constitutes the federal question and gives this court jurisdiction. * * *

"The question upon which the case must turn is whether the operation and effect of the contract for an interstate shipment, as shown by the receipt or bill of lading, is governed by the local

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law of the state, or by the acts of Congress regulating interstate commerce.

"That the constitutional power of Congress to regulate commerce among the states and with foreign nations comprehends power to regulate contracts between the shipper and the carrier of an interstate shipment, by defining the liability of the carrier for loss, delay, injury, or damage to such property, needs neither argument nor citation of authority.

"But it is equally well settled, that, until Congress has legislated upon the subject, the liability of such a carrier, exercising its calling within a particular state, although engaged in the business of interstate commerce, for loss or damage to such property, may be regulated by the law of the state. Such regulations would fall within that large class of regulations which it is competent for a state to make in the absence of legislation by Congress, growing out of the territorial jurisdiction of the state over such carriers, and its duty and power to safeguard the general public against acts of misfeasance and nonfeasance committed within its limits, although interstate commerce may be indirectly affected. *Smith v. Alabama*, 124 U. S. 465 [8 Sup. Ct. 564, 41 L. Ed. 508]; *New York, etc., R. v. New York*, 165 U. S. 628 [17 Sup. Ct. 418, 41 L. Ed. 853]; *Chicago, Milwaukee Ry. Co. v. Solan*, 169 U. S. 133, 137 [18 Sup. Ct. 289, 42 L. Ed. 688]; *Richmond, etc., Ry. v. Patterson Co.*, 169 U. S. 311 [18 Sup. Ct. 335, 42 L. Ed. 759]; *Cleveland, etc., Ry. v. Illinois*, 177 U. S. 514 [20 Sup. Ct. 722, 44 L. Ed. 868]; *Pennsylvania Railroad v. Hughes*, 191 U. S. 477 [24 Sup. Ct. 132, 48 L. Ed. 268]. In the *Solan* case, cited above, it was said of such state legislation:

"They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits.'

"In that case the court upheld the validity of an Iowa statute which made void every 'contract, receipt, rule or regulation, which shall exempt any railway from liability as a common carrier, which would exist had no contract, receipt, rule or regulation been made or entered into.'

"The contract there involved was for transportation of cattle with a drover in charge, and the shipper had signed a contract limiting the liability to himself or the drover to \$500 for injury

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to the person of the drover. Proof was offered that this limitation was the consideration for a reduced rate of transportation.

"In *Pennsylvania Railroad v. Hughes*, 191 U. S. 477, 487, 491 [24 Sup. Ct. 132, 48 L. Ed. 268], there was involved a bill of lading in all essentials identical with the one here concerned, whereby it was stipulated that, in consideration of a reduced rate of freight, the shipper should receive, in case of negligent loss, the agreed value declared in the receipt. The shipment was made in New York, where the stipulation was valid, to a point in Pennsylvania, where such a limitation was invalid. The loss occurred in the latter state; and the Supreme Court of the state upheld a judgment for the full value, declaring the limitation invalid as forbidden by the public policy of that state. That case came to this court upon the contention that the Pennsylvania court, in refusing to limit the recovery to the valuation agreed upon, had denied to the railroad company a right or privilege secured to it by the Interstate Commerce Law. But this court as to that said:

"It may be assumed that under the broad power conferred upon Congress over interstate commerce, as defined in repeated decisions of this court, it would be lawful for that body to make provision as to contracts for interstate carriage, permitting the carrier to limit its liability to a particular sum in consideration of lower freight rates for transportation. But, upon examination of the terms of the law relied upon, we fail to find any such provision therein. The sections of the interstate commerce law relied upon by the learned counsel for plaintiff in error [Act Feb. 4, 1887, c. 104] 24 St. at L. 379, 382 [U. S. Comp. St. 1901, p. 3154], [Act March 2, 1889, c. 382] 25 U. S. St. at L. 855 [U. S. Comp. St. Supp. 1911, p. 1289], provide for equal facilities to shippers for the interchange of traffic; for nondiscrimination in freight rates; for keeping schedules of rates open to public inspection; for posting the same in public places, with certain particulars as to charges, rules, and regulations; for the publication of joint tariff rates for continuous transportation over one or more lines, to be made public when directed by the Interstate Commerce Commission; against advances in joint tariff rates, except after ten days' notice to the commission; against reduction of joint tariff rates, except after three days' like notice; making it unlawful for any party to a joint tariff to receive or demand a greater or less compensation for the transportation of property between points, as to which a joint tariff is made different than is specified in the schedule filed with the commission; giving remedies for the enforcement of the foregoing provisions, and providing penalties for their violation; making it unlawful to

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prevent continuous carriage, and providing that no break of bulk, stoppage or interruption by the carrier, unless made in good faith for some necessary purpose without intention to evade the act, shall present the carriage of freights from being treated as one continuous carriage from the place of shipment to the place of destination.

"While under these provisions it may be said that Congress has made it obligatory to provide proper facilities for interstate carriage of freight, and has prevented carriers from obstructing continuous shipments on interstate lines, we look in vain for any regulation of the matter here in controversy. There is no sanction of agreements of this character limiting liability to stipulated valuations; and, until Congress shall legislate upon it, is there any valid objection to the state enforcing its own regulations upon the subject, although it may to this extent indirectly affect interstate commerce contracts of carriage?"

"In view of the decisions of this court in the two cases last referred to, we shall assume that this case is governed by them, unless the subsequent legislation of Congress is such as to indicate a purpose to bring contracts for interstate shipments under one uniform rule of law not subject to the varying policies and legislation of particular states.

"The original Interstate Commerce Act of February 4, 1887, was extensively amended by the Act of June 29, 1906, 34 St. at L. 584. We may pass by many of the changes and amendments made by the latter act as not decisive, and come at once to the far more important amendment made in the twentieth section, an amendment bearing directly upon the carrier's liability or obligation under interstate contracts of shipment, and generally referred to as the Carmack Amendment. * * *

"This amendment came under consideration in *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186 [31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7]; but the opinion and judgment was confined to that provision of the act which made the initial carrier liable for a loss upon the line of a connecting carrier, the property having been received under a bill of lading which confined the liability of the initial carrier to loss occurring upon its own line.

"The significant and dominating features of that amendment are these:

"First. It affirmatively requires the initial carrier to issue 'a receipt or bill of lading therefor,' when it receives 'property for transportation from a point in one state to a point in another.'

"Second. Such initial carrier is made 'liable to the lawful

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holder thereof for any loss, damage, or injury to such property caused by it.'

"Third. It is also made liable for any loss, damage, or injury to such property caused by 'any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass.'

"Fourth. It affirmatively declares that 'no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed.'

"Prior to that amendment, the rule of carrier's liability for an interstate shipment of property, as enforced in both federal and state courts, was either that of the general common law as declared by this court and enforced in the federal courts throughout the United States (*Hart v. Railroad*, 112 U. S. 331 [5 Sup. Ct. 151, 28 L. Ed. 717]), or that determined by the supposed public policy of a particular state (*Pennsylvania Railroad v. Hughes*, 191 U. S. 477 [24 Sup. Ct. 132, 48 L. Ed. 268]), or that prescribed by statute law of a particular state (*Chicago, etc., Railroad v. Solan*, 169 U. S. 133 [18 Sup. Ct. 289, 42 L. Ed. 688]).

"Neither uniformity of obligation nor of liability was possible until Congress should deal with the subject. The situation was well depicted by the Supreme Court of Georgia in *Southern Pacific Railway Co. v. Crenshaw* [5 Ga. App. 675] 63 S. E. 865, where that court said:

"Some states allowed carriers to exempt themselves from all or a part of the common-law liability by rule, regulation or contract; others did not. The federal courts sitting in the various states were following the local rule; a carrier being held liable in one court when, under the same state of facts, he would be exempt from liability in another. Hence this branch of interstate commerce was being subjected to such a diversity of legislative and judicial holding that it was practically impossible for a shipper, engaged in a business that extended beyond the confines of his own state, or a carrier whose lines were extensive, to know without considerable investigation and trouble, and even then oftentimes with but little certainty, what would be the carrier's actual responsibility as to goods delivered to it for transportation from one state to another. The congressional action has made an end to this diversity, for the national law is paramount and supersedes all state laws as to the rights and liabilities and exemptions created by such transaction. This was doubtless the purpose of the law; and this purpose will be effectuated and not impaired or destroyed by the state courts obeying and enforcing the provisions of the federal statute, where applicable to the facts in such cases as shall come before them.'

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"That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation, or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But, when Congress acted in such a way to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist. *Northern Pacific Ry. v. State of Washington*, 222 U. S. 370 [32 Sup. Ct. 160, 56 L. Ed. 237]; *Southern Ry. Co. v. Reid*, 222 U. S. 424 [32 Sup. Ct. 140, 56 L. Ed. 257]; *Mondou v. Railroad*, 223 U. S. 1 [32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44]; *Michigan Central Railroad v. Vreeland* [227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. —], just decided.

"To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy will either make the provision less than supreme or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable, and the latter would be to revert to the uncertainties and diversities of rulings which led to the amendment. The duty to issue a bill of lading, and the liability thereby assumed are covered in full; and, though there is no reference to the effect upon state regulation, it is evident that Congress intended to adopt a uniform rule, and relieve such contracts from the diverse regulation to which they had been theretofore subject.

"What is the liability upon the carrier? It is a liability to any holder of the bill of lading which the primary carrier is required to issue 'for any loss, damage, or injury to such property caused by it,' or by any connecting carrier to whom the goods are delivered. The suggestion that an absolute liability exists for every loss, damage, or injury, from any and every cause, would be to make such carrier an absolute insurer and liable for unavoidable loss or damage, though due to uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words 'any loss or damage' would be to ignore the qualifying words 'caused by it.' The liability thus imposed is limited to 'any loss, injury, or damage caused by it or a succeeding carrier to whom the property may be delivered,'

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and plainly implies a liability for some default in its common-law duty as a common carrier.

"But it has been argued that the nonexclusive character of this regulation is manifested by the proviso of the section, and that state legislation upon the same subject is not superseded, and that the holder of any such bill of lading may resort to any right of action against such a carrier conferred by existing state law. This view is untenable. It would result in the nullification of the regulation of a national subject, and operate to maintain the confusion of the diverse regulations which it was the purpose of Congress to put an end to.

"What this court said of the twenty-second section of this Act of 1906 in the case of *Texas & Pac. Ry. v. Abilene Cotton Mills*, 204 U. S. 426, [27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075], is applicable to this contention. It was claimed that that section continued in force all rights and remedies under the common law or other statutes. But this court said of that contention, what must be said of the proviso in the twentieth section, that it was 'evidently only intended to continue in existence such other rights or remedies for the redress of some specific wrong or injury, whether given by the Interstate Commerce Act, or by state statute, or common law, not inconsistent with the rules and regulations prescribed by the provisions of this act.' Again it was said of the same clause, in the same case, that it could 'not in reason be construed as continuing in a shipper a common-law right, the existence of which would be inconsistent with the provisions of the act. In other words, the act cannot be said to destroy itself.'

"To construe this proviso as preserving to the holder of any such bill of lading any right or remedy which he may have had under existing federal law at the time of his action gives to it a more rational interpretation than one which would preserve rights and remedies under existing state laws, for the latter view would cause the proviso to destroy the act itself. One illustration would be a right to a remedy against a succeeding carrier, in preference to proceeding against the primary carrier, for a loss or damage incurred upon the line of the former. The liability of such succeeding carrier in the route would be that imposed by this statute, and for which the first carrier might have been made liable.

"We come now to the question of the validity of the provision in the receipt or bill of lading limiting liability to the agreed value of \$50, as shown therein. This limiting clause is in these words:

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"In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding \$50, unless a greater value is declared, the shipper agrees that the value of said property is not more than \$50, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than \$50, if no value is stated herein'

"The answer states that the schedules which the express company had filed with the Interstate Commerce Commission showed rates based upon valuations, and that the lawful and established rate for such a shipment as that made by the plaintiff from Cincinnati to Augusta, having a value not in excess of \$50, was 25 cents, while for the same package, if its value had been declared to be \$125, the amount for which the plaintiff sues as the actual value, the lawful charge, according to the rate filed and published, would have been 55 cents. It is further averred that the package was sealed, and its contents and actual value unknown to the defendant's agent.

"That no inquiry was made as to the actual value is not vital to the fairness of the agreement in this case. The receipt which was accepted showed that the charge made was based upon a valuation of \$50, unless a greater value should be stated therein. The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the commission. That presumption is strengthened by the fact that, across the top of this bill of lading, there was this statement in bold type: 'This company's charge is based upon the value of the property, which must be declared by the shipper.'

"That a common carrier cannot exempt himself from liability for his own negligence or that of his servants is elementary. *York Co. v. Central Railroad*, 3 Wall. 107 [18 L. Ed. 170]; *Railroad Co. v. Lockwood*, 17 Wall. 357 [21 L. Ed. 627]; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174 [23 L. Ed. 872]; *Hart v. Pennsylvania Railroad*, 112 U. S. 331, 338 [5 Sup. Ct. 151, 28 L. Ed. 717]. The rule of the common law did not limit his liability to loss and damage due to his own negligence, or that of his servants. That rule went beyond this, and he was liable for any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy. But the rigor of this liability might be modified through any fair, reasonable, and just agreement with the shipper which did not include exemption against the negligence of the carrier or his servants. The

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inherent right to receive a compensation commensurate with the risk involved the right to protect himself from fraud and imposition by reasonable rules and regulations, and the right to agree upon a rate proportionate to the value of the property transported.

"It has therefore become an established rule of the common law, as declared by this court in many cases, that such a carrier may by a fair, open, just, and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value, made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk. *York Co. v. Railroad*, 3 Wall. 107 [18 L. Ed. 170]; *Railroad v. Lockwood*, 17 Wall. 357 [21 L. Ed. 627]; *Hart v. Pennsylvania Railroad*, cited above; *Phoenix Ins. Co. v. Erie Trans. Co.*, 117 U. S. 312, 322 [6 Sup. Ct. 1176, 29 L. Ed. 873]; *Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 442 [9 Sup. Ct. 469, 32 L. Ed. 788]; *New York, etc., Ry. Co. v. Estill*, 147 U. S. 591, 619 [13 Sup. Ct. 444, 37 L. Ed. 292]; *Primrose v. W. U. Telegraph Co.*, 154 U. S. 1, 15 [14 Sup. Ct. 1098, 38 L. Ed. 883]; *Chicago, etc., Ry. v. Solan*, 169 U. S. 133, 135 [18 Sup. Ct. 289, 42 L. Ed. 688]; *Calderon v. Steamship Co.*, 170 U. S. 272, 278 [18 Sup. Ct. 588, 42 L. Ed. 1033]; *Pennsylvania Railroad v. Hughes*, 191 U. S. 477, 485 [24 Sup. Ct. 132, 48 L. Ed. 268].

"That such a carrier might fix his charges somewhat in proportion to the value of the property is quite as reasonable and just as a rate measured by the character of the shipment. The principle is that the charge should bear some reasonable relation to the responsibility, and that the care to be exercised shall be in some degree measured by the bulk, weight, character, and value of the property carried.

"Neither is it conformable to plain principles of justice that a shipper may understate the value of his property for the purpose of reducing the rate, and then recover a large value in case of loss. Nor does a limitation based upon an agreed value for the purpose of adjusting the rate conflict with any sound principle of public policy. The reason for the legality of such agreements is well stated in *Hart v. Pennsylvania Railroad*, cited above, where it is said:

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater.

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The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss.'

"The statutory liability, aside from responsibility, for the default of a connecting carrier in the route, is not beyond the liability imposed by the common law, as that body of law applicable to carriers has been interpreted by this court as well as many courts of the states. *Greenwald v. Barrett*, 199 N. Y. 170, 175 [92 N. E. 218, 35 L. R. A. (N. S.) 971]; *Bernard v. Adams Express Co.*, 205 Mass. 254, 259 [91 N. E. 325, 327, 28 L. R. A. (N. S.) 293, 18 Ann. Cas. 351]. The exemption forbidden is, as stated in the case last cited, 'a statutory declaration that a contract of exemption from liability for negligence is against public policy and void.' This is no more than this court, as well as other courts administering the same general common law, have many times declared. In the same case, just such a stipulation as that here involved was upheld; the court saying:

"'But such a contract as we are considering in this case is not an exemption from liability for negligence in the management of property within the meaning of the statute. It is a contract as to what the property is, in reference to its value. The purpose of it is not to change the nature of the undertaking of the common carrier, or limit his obligation in the care and management of that which is intrusted to him. It is to describe and define the subject-matter of the contract, so far as the parties care to define it, for the purpose of showing of what value that is which comes into the carrier's possession, and for which he must account in the performance of his duty as a carrier. It is not in any proper sense a contract exempting him from liability for the loss, damage, or injury to the property, as the shipper describes it in stating its value for the purpose of determining for what the carrier shall be accountable upon his undertaking, and what price the shipper shall pay for the service, and for the risk of loss which the carrier assumes.'

"In *Greenwald v. Barrett*, cited above, the same conclusion was reached as to the nature of the liability imposed and the pur-

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port of the exemption forbidden; the court, among other things, saying:

"The language of the enactment does not disclose any intent to abrogate the right of common carriers to regulate their charges for carriage by the value of the goods, or to agree with the shipper upon a valuation of the property carried. It has been the uniform practice of transportation companies in this country to make their charges dependent upon the value of the property carried; and the propriety of this practice and the legality of contracts signed by the shipper, agreeing upon a valuation of the property, were distinctly upheld by the Supreme Court of the United States in *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 341 [5 Sup. Ct. 151, 156 (28 L. Ed. 717)]. * * *

"That a carrier rate may be graduated by value, and that a stipulation limiting recovery to an agreed value made to adjust the rate is recognized by the Interstate Commerce Commission, see [*In re Released Rates*] 13 Interst. Com. R. 550.

"We therefore reach the conclusion that the provision of the act forbidding exemptions from liability imposed by the acts is not violated by the contract here in question."

In *Chicago, B. & Q. Ry. Co. v. Miller*, 226 U. S. 513, 33 Sup. Ct. 155, 57 L. Ed. —, and *Chicago, St. P., M. & O. Ry. Co. v. Latta*, 226 U. S. 519, 33 Sup. Ct. 155, 57 L. Ed. —, decided by the Supreme Court on the same date, the case of *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. —, is followed and the same rule announced.

It follows from the foregoing authorities that on account of the passage of the Hepburn Act by Congress on June 29, 1906 (34 St. at L. 584, c. 3591 [U. S. Comp. St. Supp. 1911, p. 1284]), the state under its police power has ceased to have authority to pass acts relative to contracts made by carriers relating to interstate commerce, and section 9, art. 23 (section 358, Williams' Ann. Const. Okla.), of the Constitution of this state, applies only to intrastate shipments.

This court, in many instances, has held that the common-law liability of the carrier for the safe carriage of property may be limited by a special contract with the shipper, where such contract is supported by a consideration, is reasonable and fairly entered into by the shipper, and does not attempt to cover losses caused by the negligence or misconduct of the carrier. *St. Louis & S.*

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F. R. Co. v. Copeland, 23 Okla. 837, 102 Pac. 104; *Patterson v. M., K. & T. Ry. Co.*, 24 Okla. 747, 104 Pac. 31; *M., K. & T. Ry. Co. v. Davis*, 24 Okla. 677, 104 Pac. 34, 24 L. R. A. (N. S.) 866; *St. Louis & S. F. R. Co. v. Cake*, 25 Okla. 227, 105 Pac. 322; *Chicago, R. I. & P. Ry. Co. v. Wehrman*, 25 Okla. 147, 105 Pac. 328; *M., K. & T. Ry. Co. v. Hancock*, 26 Okla. 254, 109 Pac. 220; *M., K. & T. Ry. Co. v. Hancock & Goodbar*, 26 Okla. 265, 109 Pac. 223; *Midland Valley R. Co. v. Ezell*, 29 Okla. 40, 116 Pac. 163; *St. L. & S. F. R. Co. v. Young*, 30 Okla. 588, 120 Pac. 999; *C., R. I. & P. Ry. Co. et al. v. Spears*, 31 Okla. 469, 122 Pac. 228; *St. Louis & S. F. R. Co. v. Ladd*, 33 Okla. 160, 124 Pac. 461; *C., R. I. & P. Ry. Co. v. Conway*, 34 Okla. 356, 125 Pac. 1110. In all these cases the contract of shipment was entered into prior to the erection of the state. The decisions of the Supreme Court of the United States were controlling in the construction of said contracts, and were followed by this court in deciding said cases. As to the cases arising since the erection of the state, where the contracts relate to interstate shipment, the same authority governs. As to intrastate shipments a different rule applies.

Section 18, art. 9 (section 234, Williams' Ann. Const. Okla., par. 1), of the Constitution of this state, provides:

"All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company inconsistent with those prescribed by the commission, within the scope of its authority, shall be unlawful and void."

It is not contended that the commission has prescribed any such rules for the entering into of such contracts relative to intrastate shipments; and therefore contracts entered into between a shipper and a carrier in this state, relating to an intrastate shipment limiting the common-law liability of the carrier for the safe carriage of property, even though such contract be supported by a consideration, and fairly entered into between the shipper and the carrier, the same would be void; and any provision in any such contract between the shipper and the carrier relating to intrastate shipments, stipulating for the notice or demand as a condition precedent to establish any claim, demand, or liability of such shipper for breach of contract, is also void.

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The court sustained the demurrer of the plaintiff to certain parts of the second paragraph of the defendant's answer. No assignment or specification of error as to this action, relative to the demurrer, is made in the brief as required by rule 25 (20 Okla. xii, 95 Pac. viii) of this court, and the same is therefore waived.

The following specifications of error are presented for our consideration: (1) In overruling plaintiff in error's demurrer to the evidence. (2) In denying plaintiff in error's request for a peremptory instruction. (3) In admitting certain evidence on the part of defendant in error. (4) In excluding certain evidence offered by plaintiff in error. (5) In refusing to give the following instruction:

"If you find that the cattle arrived at the National Stock Yards, Ill., in a damaged condition, that alone will not warrant a recovery by the plaintiff. Before you can find for the plaintiff, you must be able to find, from a fair preponderance of the evidence, the further fact that the damaged condition was caused by and was the direct and proximate result of some act of negligence on the part of the defendant; and, unless you so find, you will find for the defendant."

The first and second specifications of error will be considered together.

1. In the brief of the plaintiff in error, it is said:

"This petition proceeds upon the theory that the defendant is liable in damages on account of failure to deliver the live stock, shipped by plaintiff, at destination within time for the market of a certain day. If in fact the shipping contract is to be considered of any binding efficacy, section 5 thereof is a sufficient answer to plaintiff's demand."

Section 5 of said contract is set out as paragraph 2 in the answer.

If the failure to deliver within a reasonable time, so as to reach a particular market, is occasioned by the negligence or acts of omission on the part of the carrier, it is liable regardless of any contract to the contrary. The carrier is liable for delay occasioned by failure of engines, cars, machinery, obstructions of the track, or for any cause whatever, where such intervening cause results from the negligence or act of omission on the part

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of the carrier. The evidence, as disclosed by the record, presented a question for the determination of the jury.

2. Under the third specification of error, the question as to the admission of the following evidence is presented for review:

"Q. State to the jury what condition those cattle were in. A. They were badly bruised, gaunted up, and gored, where they had hooked and horned one another, and made long scars and marks on them, and several showed where they had been badly handled in the cars. (Defendant objects to the evidence, or any evidence going to show that the damage is caused by the cattle goring one another. They cannot expect damages for the cattle goring one another. Objection sustained. Defendant reads live stock contract to the court. Objection sustained so far as the witness has testified about the cattle goring one another.) Q. State the condition of the cattle as to bruises, if there were any. A. They were badly bruised. Q. What caused this? (Defendant objects, as being incompetent and irrelevant. Objection overruled, to which ruling of the court the defendant excepts.) A. Being lugged about in the cars. Being jammed against the sides and ends of the cars."

This was not error under issues as framed in the trial court.

It is also insisted that the carrier is not liable for damages to the live stock shipped because of the inherent nature of the animals inflicting injury upon one another; that, if such liability may be incurred in any instance, by the terms of the contract the carrier in this case is not liable.

Section 4 of the contract, which is set out in paragraph "b" of the answer, does not relieve the carrier from the duty of furnishing proper cars; and if it furnishes defective cars on account of which the cattle are injured, or the injury is caused by such negligence, it cannot contract with the shipper so as to relieve itself from the consequence of such acts. As to overloading of cars, if the loading is done by the shipper, where such is permitted by law, then that is his negligence and not of the carrier. But if the cattle are placed in the stock pens, and the loading is done by the employees of the carrier, and by its negligence the cars are overloaded, it cannot relieve itself from such negligence by contract. Likewise, if the live stock escape from cars as a

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result of the negligence of the carrier, the same rule applies. If the live stock are injured on account of being wild, unruly, or weak, or maim each other or themselves, or from fright, crowding, heat, or suffocation, such injuries resulting therefrom being proximate to no act or omission of the carrier, then under said contract the carrier would not be liable. *St. Louis & S. F. R. Co. v. Copeland, supra.*

As to certain evidence on the part of the shipper relating to the value of the cattle, the witness stated that he knew the value of the cattle on the market, and then stated what the value was. He afterwards stated that he based this opinion upon statements made to him by a live stock purchaser at the stock yards, the point of destination; and the record shows that the witness was a cattleman with knowledge as to cattle.

In *St. Louis & S. F. R. Co. v. Crowell*, 33 Okla. 773, 127 Pac. 1063, paragraph 1 of the syllabus is as follows:

"To lay a foundation for the admission of evidence as to the value of millinery goods kept for sale in stores, it is sufficient to show that the witness' knowledge was that of a dealer in such goods, and by pricing same at the time she made the purchase of the lot in controversy. The weight of the opinion then given is for the jury."

This was sufficient predicate for the admission of the evidence; the question as to its weight being for the jury.

3. As to the fourth assignment of error relative to the Live Stock Reporter, the record recites that it is made a part thereof, and identified as Exhibit B; but it appears not to have, in fact, been made a part of the record. The record recites:

"Q. I read from this paper the following sentence, and ask you to state— (Plaintiff objects to defendant reading from this paper, as it has not been proven to be an authoritative paper. Objection sustained as to so much of the reading as states the price sold for and the number of cattle.)"

No exception seems to have been reserved.

"Q. I will ask you to state whether, as a matter of fact, they were common ordinary Oklahoma Tale End steers. (Objected to as leading. Objection sustained, to which ruling of the court the defendant excepts.)"

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The witness was introduced on the part of the defendant (plaintiff in error) ; and, the question clearly being leading, it was within the discretion of the trial court to sustain the objection on that ground. At another part of the record we find the following :

"Q. Mr. Bilby, I hand you the Daily Live Stock Reporter, which the reporter has marked defendant's Exhibit B, and call your attention to the date of April 10, 1909, and call your attention to the lefthand column on the front page, which has been marked with an indelible pencil, and ask you to state if that does not show the sale of your cattle? (To which the plaintiff objects because it is incompetent and immaterial. Objection sustained, to which the defendant excepts.)"

We fail to find in the record this exhibit or it identified in such a way as we can determine what the defendant was seeking to offer, and for that reason we are unable to determine whether the trial court committed error. The burden is on the plaintiff in error to show error. *Tate v. Stone, ante*, 130 Pac. 296.

4. As to the fifth specification of error, the instruction complained of seems to correctly define the law ; but this subject appears to have been fully covered in the general charge, and, that being the case, the action of the trial court in that respect was free from error. *Coalgate Co. v. Hurst*, 25 Okla. 588, 107 Pac. 657 ; *Kingfisher Nat. Bank et al. v. Johnson*, 22 Okla. 228, 98 Pac. 343 ; *Citizens' Bank v. Garnett et al.*, 21 Okla. 200, 95 Pac. 755.

The judgment of the lower court is affirmed.

All the Justices concur.

MISSOURI, O. & G. RY. CO. v. MCCLELLAN.

No. 3428. Opinion Filed March 11, 1913.

(130 Pac. 916.)

1. **APPEAL AND ERROR—Petition in Error—Amendment—Assignments—Overruling Motion for New Trial.** An assignment of error to the effect that the court below erred in overruling a motion for a new trial is a new and distinct assignment of error; and a petition in error in the Supreme Court cannot be amended by incorporating such assignment therein after the statutory time for perfecting an appeal has expired.
2. **SAME—Assignments of Error—Motion to Strike Case from Docket.** An order overruling a motion to strike a case from the trial docket will not be reviewed by this court on appeal, where such ruling of the trial court has not been assigned in the motion for a new trial, and exceptions to the ruling on the motion for a new trial saved, and the overruling of the motion assigned in the petition in error in this court.
3. **PLEADING—Petition—Objection at Trial.** Where there has been a trial, and no objection has been made to the petition by demurrer or by motion, an objection to the introduction of evidence under the petition for the reason that it does not state a cause of action, or an objection to the sufficiency of the petition in this court, will be held good only when there is a total failure to allege in the petition the relief sought; and the petition will be liberally construed, if necessary, in order to sustain same.

(Syllabus by the Court.)

Error from District Court, Hughes County;
John Caruthers, Judge.

Action by D. W. McClellan against the Missouri, Oklahoma & Gulf Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

E. R. Jones and J. C. Wilhoit (Alexander New and Arthur Miller, of counsel), for plaintiff in error.

Crumph & Skinner, for defendant in error.

HAYES, C. J. Defendant in error, hereinafter called plaintiff, brought this action against plaintiff in error hereinafter called

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defendant in the court below to recover for injuries he alleges that he sustained by reason of negligence of the defendant while he was employed by defendant as a section foreman. A trial upon the issues formed by the pleadings resulted in a verdict and judgment in favor of plaintiff in the sum of \$7,000, to reverse which this appeal is prosecuted.

Four assignments of error are presented for reversal. The first and second assignments present the contention that the trial court erred in overruling defendant's motion to strike the case from the trial docket; the third assignment complains of the court's overruling a motion of defendant for an order requiring plaintiff to submit to a physical examination; and the fourth assignment complains of the overruling of an objection by defendant to the introduction of any testimony by plaintiff in support of his petition, upon the ground that the petition does not state facts sufficient to constitute a cause of action.

A motion for a new trial, presented by defendant to the trial court, was overruled; but this action of the court was not assigned in the petition in error filed here. After the statutory time for taking an appeal had expired defendant made application to this court for leave to file an amended petition in error, by which it would assign as error the action of the court in overruling the motion for a new trial; but its application cannot be granted, for such an assignment of error is a new and distinct assignment, setting up a new cause for the reversal of the judgment of the lower court and it cannot be made after the statutory time for perfecting the appeal has expired. *Smith v. Alva State Bank*, *post*, 130 Pac. 916; *Maggart v. Wakefield et al.*, 31 Okla. 751, 123 Pac. 1042; *Haynes v. Smith*, 29 Okla. 703, 119 Pac. 246.

No action of the trial court, therefore, can be reviewed in this proceeding which it is required shall be first presented to the trial court by a motion for a new trial. The first inquiry, therefore, this proceeding presents to the court for consideration is: Was the overruling of defendant's motion to strike the cause from the docket a ground for a new trial, and the presentation of such error to the trial court by motion for a new trial necessary in order that it may be reviewed in this court? It has been

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held in numerous cases that errors of law occurring at the trial cannot be reviewed in this court on appeal, unless such errors have been presented to the trial court by motion for a new trial, and exceptions saved to the overruling of the motion for a new trial, and the act of the court in overruling the motion for a new trial assigned as error in the petition in error in this court; but what acts of the court preceding the trial may be assigned as grounds for a new trial, and must be presented in a motion for a new trial before they can be reviewed on appeal, has not been clearly determined in any case.

In *Powell et al. v. Nichols et al.*, 26 Okla. 734, 110 Pac. 762, it was sought to set aside a levy of execution, and it was held that an order of the trial court refusing to set aside the levy was appealable without a motion for a new trial. *Williamson et al. v. Adams et al.*, 31 Okla. 503, 122 Pac. 499, was an appeal from an order overruling a motion to set aside a sale made under execution. Following *Powell et al. v. Nichols et al.*, *supra*, it was held that no motion for a new trial was necessary in order to review the action of the court complained of. In *Bond et al. v. Cook et al.*, 28 Okla. 446, 114 Pac. 723, it was sought to reverse an order of the lower court dismissing an appeal from a justice court; and it was held that a motion for a new trial was unnecessary for such purpose. But none of these cases is decisive of the question involved in the instant case.

Eight different grounds for a new trial are specified by the statute, which, in the language of the statute, are as follows:

"First, irregularity in the proceedings of the court, jury, referee, or prevailing party, or any order of the court or referee, or abuse of discretion, by which the party was prevented from having a fair trial. Second, misconduct of the jury or prevailing party. Third, accident or surprise, which ordinary prudence could not have guarded against. Fourth, excessive damages, appearing to have been given under the influence of passion or prejudice. Fifth, error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property. Sixth, that the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law. Seventh, newly discovered evidence, material for the party applying, which he could not, with

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reasonable diligence, have discovered and produced at the trial. Eighth, error of law occurring at the trial, and excepted to by the party making the application." (Section 5825, Comp. Laws 1909.)

A motion for a new trial must be made at the term the verdict, report, or decision is rendered, except for newly-discovered evidence and shall be made within three days after the verdict or decision was rendered, unless unavoidably prevented. A new trial as defined by the statute (section 5825, Comp. Laws 1909) is the re-examination of issues of fact arising upon the pleadings. *Powell et al. v. Nichols et al., supra.* Where there has been no trial upon issues of fact formed by the pleadings, no motion for a new trial is authorized by the statute; and the setting aside of an order made by the court after a final judgment has been entered, which will not result in a trial upon the issues of fact made by the pleadings, is not the granting of a new trial, and motions therefor do not constitute applications for a new trial.

In the *Powell* case and in the *Williamson* case, no motion for a new trial was required, because the relief sought by the complaining parties was not a new trial. The purpose of a new trial is to correct errors in the proceedings of the court that have prevented a fair trial. No action of the trial court after the trial, and after the judgment has become final, however erroneous, can in any way affect the trial; nor is a new trial necessary to correct such an error. The statute does not, therefore, authorize motions for new trials for this purpose, or require that motions for new trials shall be presented as a condition to the right to review of orders made subsequent to the trial. In the *Bond* case, there could be no new trial, because there never had been any trial, and no motion therefor was necessary in order to review the judgment of dismissal.

The motion for a new trial, contemplated and authorized by the statute, contemplates that there has been a hearing upon the issues of fact made by the pleadings, and that because of an erroneous action or irregularity in some part of the proceedings, either before or at the trial, on the part of the court, the jury, or the parties to the proceeding, a fair trial has not been had. Where there has been no trial, to hold that right to have reviewed

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an order of a court made appealable by the statute is waived, unless presented by motion for a new trial, would be to hold that an error may be waived by failure of the party to do that which the statute neither requires nor authorizes. It has been several times held that errors appearing on the judgment roll or record may be corrected on appeal, without exception having been taken thereto, and without their having been presented by a motion for a new trial. *Goodwin et al. v. Bickford*, 20 Okla. 91, 93 Pac. 548, 129 Am. St. Rep. 729; *International Harvester Co. of America v. Cameron*, 25 Okla. 256, 105 Pac. 189; *Epstein v. Handwerker*, 29 Okla. 337, 116 Pac. 789. But motions and rulings of the court thereon do not constitute in this jurisdiction part of the judgment roll or record. *Cook et al. v. Larson*, 47 Kan. 70, 27 Pac. 113, is not, therefore, decisive of the question here under consideration. In that case it was held that a motion for a continuance may be reviewed without a motion for a new trial, upon the theory that the motion for continuance constituted a part of the judgment roll or record. In *Buxton v. Alton-Dawson Mer. Co.*, 18 Okla. 287, 90 Pac. 19, it was held, on appeal from a motion overruling a new trial, that the action of the court in overruling a motion to quash summons could not be reviewed, where the statutory time for taking an appeal had elapsed since the overruling of the motion to quash, although the appeal from the overruling of the motion for a new trial was taken in due time, because a motion for a new trial was not necessary to review any question arising upon the motion to quash summons, and that an appeal would lie directly from the action of the court upon the motion to quash. This case, however, was decided by a divided court, and was overruled upon this question by *Spaulding et al. v. Polley*, 28 Okla. 764, 115 Pac. 864.

Adverting to the statute which specifies the grounds upon which motions for new trials may be granted, it has been suggested that only errors of law occurring at the trial constitute grounds for a new trial; but the statute itself contains no such restrictions, and this construction of the statute set out above cannot be made without, in a large measure, rendering meaningless the first paragraph of the statute. If only errors of law oc-

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curing at the trial may be assigned in a motion for a new trial, as authorized by the eighth paragraph of the section, then why was it provided in the first paragraph of the section that "irregularity in the proceedings of the court, * * * any order of the court * * * by which the parties were prevented from having a fair trial," shall be sufficient grounds for a new trial. There is nothing in the language of the statute that indicates that the "irregularities" or "orders" of the court referred to shall be limited to those occurring at the trial, and, if it had been so intended, then there would have been no necessity of the eighth paragraph. We think by this provision of the statute it was intended to provide that wherever there has been a trial in a case, if any irregularity of the court has occurred, or any order has been made by the court at any stage of the proceeding which has prevented a fair trial, such error may be corrected by a motion for a new trial. If a party fails to avail himself of this remedy afforded by the statute to correct an error, he must be held to have waived the error if the error is not a fundamental one that cannot be waived by the parties to a suit, for it is to the interest of the public that there be an end to litigation. Of course, jurisdictional errors cannot be waived by the parties; and if the court fails to obtain jurisdiction of the subject-matter, or if the petition fails to state a cause of action, such questions may be raised for the first time on appeal. *Epstein v. Handwerker, supra*; *International Harvester Co. of America v. Cameron, supra*; *City of Guthrie v. Nix, Halsell & Co.*, 3 Okla. 136, 41 Pac. 343; *Leforce et al. v. Haymes*, 25 Okla. 190, 105 Pac. 644.

But irregularity in setting a case on the trial docket before it is triable under the statute is an error that may be waived by the parties. *Conwill v. Eldridge, ante*, 130 Pac. 912; *Hiatt et al. v. Renk*, 64 Ind. 590. We are therefore of the opinion that it was essential to defendant's right to have reviewed the order of the court refusing to strike the cause from the docket, that it present the alleged error by motion for new trial to the trial court, and assign as error in his petition in error the overruling of the motion. As supporting this conclusion, the following authorities may be cited also: *Masoner et al. v. Bell*, 20 Okla.

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618, 95 Pac. 239, 18 L. R. A. (N. S.) 166; *Scanlin v. Stewart et al.*, 138 Ind. 574, 37 N. E. 401, 38 N. E. 401; *Zimmerman v. Gaumer et al.*, 152 Ind. 552, 53 N. E. 829; *State v. Alred*, 115 Mo. 471, 22 S. W. 363; *Palmer v. Shenkel et al.*, 50 Mo. App. 571.

The foregoing conclusion disposes of the third assignment of error.

Referring to the fourth assignment, it has been suggested that in *Golding et al. v. Eidson et al.*, 2 Kan. App. 307, 43 Pac. 104, it was held that the ruling of a trial court sustaining an objection to the introduction of evidence under the answer of the defendant, on the ground that it stated no defense, was an error of law occurring at the trial for which a new trial could be granted by the trial court, and will be deemed waived on appeal when a motion for a new trial was not filed; but we do not deem it material to decide whether such a ruling must be presented by a motion for a new trial in order to be presented for review in this court, for it may be objected for the first time in this court that a petition does not state a cause of action; but where there has been a trial, and no objection has been made to the petition by demurrer or by motion, an objection to the introduction of evidence under the petition, or an objection to the sufficiency of the petition in this court will be held good only when there is a total failure to allege in the petition some matter essential to the relief sought; and the petition will be liberally construed with a view of sustaining the action. In such instances it is the duty of the court to take into consideration all the pleadings filed in the case, the answer and reply, as well as the petition, and if from all the pleadings the court can find that there is a cause of action in favor of plaintiff, the objection should be overruled. *First Nat. Bank of Pond Creek v. Cochran*, 17 Okla. 538, 87 Pac. 855; *Marshall v. Homier*, 13 Okla. 264, 74 Pac. 368; *Rice v. West*, 10 Okla. 1, 33 Pac. 706.

We are aware that a different rule prevails in many jurisdictions, which requires that a pleading shall at all times be strictly construed against the pleader; but under the conditions of the authorities in this jurisdiction it is unnecessary to review the decisions of the court from other jurisdictions. Applying this rule.

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we have read the petition carefully, and the objection that it does not state a cause of action is without sufficient merit to require us to set out here in detail the contents of the petition, or to enter into any lengthy discussion thereof.

Since the assignments of error are without merit, the judgment of the trial court is affirmed.

KANE, DUNN, and TURNER, JJ., concur; WILLIAMS, J., not participating.

**BOARD OF COUNTY COM'RS OF LINCOLN COUNTY
v. ROBERTSON.**

No. 3567. Opinion Filed March 11, 1913.

(130 Pac. 947.)

1. **APPEAL AND ERROR—Motion for Judgment on Pleadings—Entry of Judgment.** A motion for judgment on the pleadings is in effect a general demurrer, and under section 6067, Comp. Laws 1909, an order denying the same is appealable to the Supreme Court although no judgment on the issues is rendered thereon.
2. **DRAINS — District and Prosecuting Attorneys — Commissioners for Drainage District—Employment of Attorney—Authority.** A board of county commissioners acting as commissioners for a drainage district has authority to employ attorneys in order to prosecute or defend the formation of such district, and it is not part of the official duty of the county attorney of the county within which such district is located to act as such.
3. **COUNTIES — Drainage District — Claims—Allowance—Review by County Commissioners.** The board of county commissioners as such has no authority or jurisdiction to re-audit and disallow a legal claim previously audited and allowed by such board while acting as drainage commissioners in the formation of a drainage district.

(Syllabus by the Court.)

*Error from District Court, Lincoln County;
Chas. B. Wilson, Jr., Judge.*

Proceeding by J. B. A. Robertson for the allowance of his account as attorney for a drainage district in Lincoln County. A motion for a judgment on the pleadings by Robertson having

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been denied, the Board of County Commissioners brings error, and Robertson alleges cross-errors. Reversed and remanded.

Dale & Bierer and W. L. Johnson, for plaintiff in error.

J. B. A. Robertson, pro se.

DUNN, J. This case presents error from the district court of Lincoln county, and arises out of the employment by the board of county commissioners, acting as commissioners for the Deep Fork drainage district, located in that county, of J. B. A. Robertson, Esq., defendant in error, as its attorney, in the organization and litigation growing out of the creation of that district. The record discloses that on August 12, 1910, defendant in error presented to the said board of county commissioners so acting the following application:

"To the Honorable Board of County Commissioners of Lincoln County, Oklahoma—Gentlemen: I hereby make application to your honorable board to be employed by you as counsel for the legal work to be done and required in the so-called Deep Fork drainage district, said employment to be made by virtue and authority of the drainage law of the state, and paid for as provided by law and the estimate of the viewers filed in the office of the county clerk; the value of said service to be fixed by you in accordance to the amount and value of services performed. Respectfully submitted, J. B. A. Robertson."

Whereupon the said board, taking action thereon, unanimously passed the following resolution:

"Whereas, by virtue of the contemplated public improvement about to be made in Lincoln county, Oklahoma, commonly known as the Deep Fork drainage ditch, and the other supplementary ditches thereto, there is absolute need of legal advise and assistance in addition to the county attorney, the work entailing more labor than one man can do and perform, and this board, the county clerk, the county surveyor and engineer and other interested parties needing the constant advice on the many questions arising by reason of the improvements aforesaid; and whereas, great damage will be done to the interested parties in said drainage district if the work is not properly done and the various interests of the county and the individuals properly protected; and whereas, said service will require the entire time of at least one competent attorney in addition to the county attorney; whereas,

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Mr. J. B. A. Robertson has made application to this board to be employed as such attorney and he being a competent attorney and not disqualified in any way: Therefore, be it resolved by the board of county commissioners of Lincoln county, Oklahoma, in session assembled this 13th day of August, 1910, that the proposition of employment made by said J. B. A. Robertson to this board this day be and the same is hereby accepted; and he is hereby employed by the board as assistant to the county attorney for the aforesaid purpose, *i. e.*, to advise this board, the county officers having duties to perform by virtue of said proposed Deep Fork drainage district and to appear in any and all courts and to prepare and file all necessary suits and to answer and defend any and all suits and to prepare all necessary papers and to do and perform fully all the duties pertaining to his said office as attorney in such matter in conjunction with the county attorney or by himself alone as may be necessary to facilitate the said work, and he is hereby authorized to proceed at once to the discharge of his duties as such attorney and his services shall be paid out of the special assessment (as provided by law) in said public improvement and to be in such sum as the amount and character of his said services shall be worth."

Thereafter, and on January 6, 1911, the question of the amount of fees earned and due to the said attorney for the said employment came before the said board of drainage commissioners for action, and the following agreement or account stated was entered into between them:

"In the matter of compensation of attorney for Deep Fork Drainage District No. 1, agreement as to fees due attorney: Whereas, this board by resolution, passed on the 13th day of August, 1910, employed J. B. A. Robertson as attorney for Deep Fork Drainage District No. 1, Lincoln county; and, whereas, said attorney at once entered upon the discharge of his duties as such attorney and has, in a manner satisfactory to the board and the best interests of the said district, discharged all the duties of his said office; and, whereas, the term of all members of the board are about to expire and it is necessary that the compensation of the said attorney be fixed by this board before the end of the official year; and, whereas, it is within the personal knowledge of all the members of this board that said attorney has appeared in the federal court for the Western district of Oklahoma, in three railway injunction cases, and has made appearance in the Circuit Court of Appeals of the United States, at St. Louis, in the three appealed cases by the said railways, and has tried about fifty

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cases before this board and several in the district court, including one appealed from this board in the matter of issuance of county warrants, and has prepared copy for the issue of bonds already printed and has proof read the same, and has corresponded with bond buyers and contractors at his own expense, and has at all times since his said employment been constantly employed in and about the proposed improvement and has advised this board since his said employment at all times concerning the said improvement; and, whereas, said improvement required various trips to the capital of the state for consultation with the State Treasurer and the Commissioners of the School Land Office, as well as the Governor and members of the state Legislature relative to the payments of the assessments against the school lands embraced in said district, and said attorney has done and performed the preliminary work looking to the introduction and passage of a bill appropriating the said assessments due in money; and whereas, the said improvement being a gigantic undertaking entailing an estimated cost of over \$800,000.00 and practically all the time of the said attorney has been taken up with the said work, the same entailing great worry, effort and energy on his part: It is therefore agreed by the parties hereto that the said J. B. A. Robertson, as such attorney, shall have and receive as and for his full compensation (including retainer fee for the entire work) up to January 1, 1911, the sum of five thousand dollars to be paid out of the assessments levied against the property in said Deep Fork Drainage District No. 1, Lincoln county, Oklahoma, this to be the addition to the sum of seventy-five dollars due the county for office rent from the said J. B. A. Robertson. Witness our hand this 6th day of January, 1911.

“GEORGE F. CLARK, Chairman.

“R. A. MORROW.

“I certify that Judge Robertson did, to the best of my knowledge, perform services claimed, but am not in a position to say what said services are worth.

“JACOB AMBERG.

“I accept the above sum in full settlement up to January 1, 1911.

“J. B. A. ROBERTSON,

“Attorney for Deep Fork Drainage District No. 1.”

Subsequently the personnel of the board of county commissioners changed, and, on defendant in error filing his approved account, properly verified, before it for allowance, it was disallowed, and an appeal was prosecuted to the district court. On

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coming on for hearing before the said court, defendant in error filed a motion for judgment on the pleadings, which, after consideration by the court, was denied. On the approval of the account by the said drainage board which made the contract, a number of private citizens petitioned the county attorney to take an appeal from its action to the district court, which was attempted to be done, but which appeal in the district court was dismissed, from which action the county attorney appealed to this court, which, however, after its lodgment here, he filed motion to dismiss, thereby disposing of that branch of the case. From the action taken by the court in denying his motion for judgment on the pleadings, defendant in error filed a cross-petition in error, and insists here that the said motion should have been sustained. The cases in the district court were consolidated and are argued and briefed together in this court.

Three propositions are urged against the allowance of the judgment asked for by defendant in error: First, that an appeal does not lie from the order denying the motion for judgment on the pleadings; second, that the board of county commissioners acting as commissioners for the drainage district lacked the authority to make the employment; third, that if possessed of the authority, the amount allowed was excessive.

Considering these objections in the order named, this court, following the Supreme Court of Kansas, has held, in the case of *Cobb v. Wm. Kenefick Co.*, 23 Okla. 440, 100 Pac. 545, that a motion for judgment on the pleadings, although unknown to the Code, is a common and permissible practice and is in effect a demurrer. Section 6067, Comp. Laws 1909, provides that "the Supreme Court may also reverse, vacate or modify any of the following orders of the district court or a judge thereof: First * * * which * * * sustains or overrules a demurrer." And that such order is appealable although no final judgment is rendered thereon, see *Burdick*, New Trials and Appeals, sec. 163; *United States Express Co. v. State*, 33 Okla. 370, 125 Pac. 448; *Bartholomew v. Guthrie*, 71 Kan. 705, 81 Pac. 491. In the case last cited it is held on this identical section of the Kansas statute that error would lie to the Supreme Court from a decision of the district

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court which sustained or overruled a demurrer, even when no judgment on the issues was rendered. Under these circumstances, the motion of plaintiff in error to dismiss the appeal of defendant in error must fall.

The insistence that it was the official duty of the county attorney of the county to serve as the attorney of the board of drainage commissioners arises from a misconception of both the scope of his duties as laid down and provided for by the statute and also from the character and nature of the said board. Under the drainage act and its amendments (chapter 32, Comp. Laws 1909, and chapter 79, Sess. Laws 1910), a drainage district is a separate, independent, and distinct entity from the county itself. It is not brought into existence or created for the purpose of either county, township, or any other species of municipal government. It presents merely a voluntary or involuntary association of a number of people whose lands lie within a certain drainage belt under which certain improvements are made which increase the utility and value of the lands therein, and which is recognized and controlled by the statutes of the state for the reason that it conduces to the general welfare of the people of the county or of the state. The people primarily interested in the project are always those whose lands are benefited or damaged or who receive pay for the damages. The statute fixing the duties of the county attorney relates in no particular whatsoever to such a project as this, and he is neither elected nor paid by the county to devote his time and attention to prosecuting or defending the necessary legal details essential to the proper formation of such district. Moreover, in the present case the agreement entered into with defendant in error and the board of drainage commissioners shows that the services contemplated and required to be performed were not only in the courts held within Lincoln county, but that his duties carried him to the capital of the state, to the federal courts within the state, and the federal Circuit Court of Appeals at St. Louis, all of which employment was manifestly beyond the official duty of the county attorney to perform. Under these circumstances the employment of defendant in error by the board of county commissioners acting as commissioners for the

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drainage district was, in our judgment, a valid and legal charge against the said district.

We next come to the proposition that the amount of the fee allowed by the drainage commissioners was in excess of the value of the services, and that the board of county commissioners acting as the commissioners for the county, or the district court on the appeal from the disallowance of the agreed price when presented to the said county commissioners, could revise and had jurisdiction and authority to determine the amount thereof. This contention is likewise, in our judgment, predicated upon a failure to properly understand the nature of the board of drainage commissioners, and grows out of the fact that, under the provisions of the drainage act of Oklahoma, it happens that the auditing board of the county, to wit, the board of county commissioners, is made the commissioners of the drainage district. Acts similar to the one here under construction are contained in a great many of the states, and different bodies are selected as commissioners to organize drainage districts. For instance, in North Dakota, three freeholders are selected by the board of county commissioners to act as the board of drainage commissioners. Rev. Codes of North Dakota 1895, sec. 1445. In Illinois, under different proceedings, the commissioners of highway of each township are drainage commissioners. Rev. St. of Illinois 1909, c. 43, sec. 75. And under section 129, *Id.*, the commissioners are elected by the landowners within the district. In Missouri a board of supervisors are likewise elected. 2 Rev. St. Missouri 1909, sec. 5507. In Indiana the drainage commissioner is appointed by the board of county commissioners. Rev. St. of Indiana 1897, sec. 5844. In Wisconsin, after the organization of the district by the court in which the petition is filed, the court appoints three competent persons to act as commissioners. Wisconsin St. 1911, sec. 1379. In California, the board of supervisors of the county where the district lies appoints three persons to serve as trustees. 5 Gen. Laws of California, p. 370. In Nebraska, after the organization of the district by the court on petition filed, the owners of the real estate therein elect a board of

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five supervisors to conduct its affairs. Cobbey's Ann. St. of Nebraska 1911, sec. 5565.

The duties of all of these different boards are virtually the same as the duties of the board of county commissioners acting as such drainage commissioners under the Oklahoma drainage act. They are set forth in section 3045, Comp. Laws 1909, as follows:

"Said commissioners shall have exclusive jurisdiction to hear and determine all contests and objections to the creation of such district and all matters pertaining to the same, and said commissioners shall have exclusive jurisdiction in all subsequent proceedings of the district when organized except as hereinafter provided, and may adjourn hearing on any matter connected therewith from day to day, and all judgments rendered by said commissioners in relation thereto shall be final, except as herein otherwise provided. The term 'commissioner' as used in this act, shall mean the board of county commissioners."

Section 3054, *Id.*, as amended by section 5, c. 79, Sess. Laws 1910, provides for the method of payment of the costs incident to the organization of the district, and reads as follows:

"No assessment shall be made for the benefit to any land upon any other principle than that of such benefits derived, and all the assessments shall be made on the basis of benefits accorded by reason of the construction of the improvement and of giving an outlet for drainage, and the various tracts included in the whole acreage benefited, in proportion to the benefits to each tract accorded. In estimating damages the viewers and commissioners shall take into consideration the land and drains appropriated and the direction of the drain across the land. The estimate for location expenses shall include the amount of costs reported by the viewers, and reasonable provision for properly inspecting and receiving the work, and all fees of officers, as herein provided, including making of record and executing all orders and processes of the commissioners, together with the fees of clerks, engineers and other experts, and the fees for all publications required by this act."

It is the fact that in Oklahoma the board of county commissioners have been made the drainage commissioners which has produced the confusion. If some other body had been selected to perform the duties of the drainage commissioners as in the states above referred to, the agreed or stated account on coming

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to the board of county commissioners for allowance would have and should have been without question allowed, and warrant issued therefor. With the amount of the bill presented, the board of county commissioners as such had absolutely no jurisdiction and no authority. Its sole duty was to ascertain whether it has been properly allowed by the drainage commissioners and was properly presented to it, and, when it had done this, the balance of its duty was purely ministerial, and defendant in error would have been entitled to a writ of mandamus compelling its auditing and allowance. The claim presented did not create an indebtedness of the county, but was an indebtedness incurred by the drainage district and was due and owing by it; the county temporarily advancing the necessary funds to enable the parties interested in such district to create the same. Section 3064, Comp. Laws 1909.

This same question appears to have arisen both in Illinois and North Dakota, whose acts are in many particulars similar to the one in this state. The Supreme Court of Illinois, in the case of *Vandalia Drainage District v. Hutchins*, 234 Ill. 31, 84 N. E. 715, disposing of this proposition, said:

"A fair construction of this act requires that in its practical enforcement such incidental expenses as attorneys', engineers', surveyors', and commissioners' fees must be incurred in the necessary preliminary work before the assessment is spread or levied, but must be included in the original estimate and paid out of the original assessment."

The Supreme Court of North Dakota, in the case of *Erickson et al. v. Cass County et al.*, 11 N. D. 494, 92 N. W. 841, said:

"Neither do we find that charges for unauthorized items were included in the cost of the drain, as alleged by appellants. The items objected to are bridges, attorneys' fees, interest, incidental expenses, publishing notices, clerks' fees, office rent, furniture, printing, books, and supplies. It is patent that a work of the magnitude of this ditch might very properly involve expenditures such as are objected to. It was plainly the intention of the Legislature to provide for the allowance and inclusion of all items of expense which would fairly contribute to the establishment, construction, and maintenance of drains—a course which is absolutely necessary under any practical drainage law. Drains cannot be constructed unless funds are provided to pay such expenses

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as properly enter into their construction, and no other source exists for obtaining funds than assessments of benefits. Section 1466, Rev. Codes, provides that the cost of the drain shall include all the expense of locating and establishing the same, including the cost of the right of way, the drain commissioners' fees, cost of survey, cost of building bridges and culverts, interest on warrants issued or to be issued, amount of the contracts, and 'all other expenses.' This section is broad enough to include all of the items to which appellants object, and all of which we find contributed to the establishment and construction of the drain, and were therefore legitimate charges to be contracted for and allowed by the board in the exercise of a sound and reasonable discretion. Whether the sums allowed in each instance were correct, we need not inquire. They met the approval of the tribunal created by law to pass upon them. The board acted within its jurisdiction in making the allowances, and there is no claim that they acted fraudulently. That the items were proper expenditures cannot be doubted. See *Butler v. City of Toledo*, 5 Ohio St. 225. It hardly need be said that the authority of drainage boards is not arbitrary or unlimited, and that landowners and others interested are not remediless against usurpations of jurisdiction. They may invoke the same remedies against attempted usurpations of authority as are available as against other inferior boards acting in excess of their jurisdiction."

There is no claim in the case at bar that there was any irregularity or fraud entering into the presentation or allowance of the claim here in question. Under these circumstances, the motion for judgment on the pleadings should have been sustained, and the case is remanded to the district court with authority to proceed as provided for in section 1694, Comp. Laws 1909, to render judgment or to return the claim to the board with an order to proceed, requiring it to allow the claim in accordance with law.

HAYES, C. J., and KANE and TURNER, JJ., concur;
WILLIAMS, J., not participating.

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In re ASSESSMENT OF WESTERN UNION TELEGRAPH
CO., 1911, 1912.

Nos. 2016 and 3067. Opinion Filed October 29, 1912.

Rehearing Denied March 10, 1913.

(130 Pac. 565.)

1. **TAXATION—Assessment—Board of Equalization—Review of Decisions.** In a case pending in the Supreme Court on an appeal from the action of the State Board of Equalization in assessing the property of an interstate corporation for taxation, wherein a referee is appointed to take the evidence and make findings of fact and conclusions of law, the court, after the referee makes his report containing the evidence taken before him, in which there is no conflict on any material point, is at liberty to set aside the findings and conclusions of the referee, if erroneous, and substitute therefor findings and conclusions of its own based on the same evidence.
2. **SAME—Property of Corporation—Telegraph Company.** In a proceeding for the purpose of ascertaining the value of the property of an interstate telegraph company for the purpose of taxation, in the absence of evidence to the contrary, the presumption is that any natural depreciations in the value of its instrumentalities are provided for by replacements paid for out of the net earnings of the company, and that the plant of the company as a whole is always kept in an ordinary state of efficiency.
3. **SAME.** In estimating, for purposes of taxation, the value of the property of an interstate telegraph company situate within a state, it may be regarded not abstractly or strictly locally, but as a part of a system operated in other states, and the taxing state is not precluded from taxing the property because it did not create the company or confer a franchise upon it, or because the company derived rights or privileges under an act of Congress, or because it is engaged in interstate commerce.
4. **SAME.** In the absence of evidence to the contrary, the presumption is that all the property of an interstate telegraph company is part of its corporate plant, and that its tangible and intangible property are equally distributed throughout its mileage.
5. **SAME—Assessment—Nature of Proceeding.** The valuation of property for taxation is in its nature a judicial act, and, in a proceeding for that purpose wherein the value of corporate property is in dispute, the judgment rendered must be based upon competent evidence, weighed in a judicial manner.

(Syllabus by the Court.)

Opinion of the Court.

Appeal from State Board of Equalization.

Assessment of the property of the Western Union Telegraph Company for the fiscal years ending June 30, 1911, and June 30, 1912, respectively. From the assessment levied by the State Board of Equalization, the Telegraph Company appeals. Affirmed.

Cottingham & Bledsoe (Geo. H. Fearons and Francis N. Whitney, of counsel), for appellant.

Charles West, Atty. Gen., and W. C. Reeves, Asst. Atty. Gen., for the State.

KANE, J. The foregoing proceedings are appeals by the Western Union Telegraph Company from the action of the State Board of Equalization in assessing its property for taxation for the fiscal years ending June 30, 1911, and June 30, 1912, respectively. In a former opinion upon a motion to dismiss these proceedings, the jurisdiction of this court to entertain appeals from the action of the State Board of Equalization in assessing for taxation the property of corporations was upheld, and a motion for the appointment of a referee to take evidence on the trial in the Supreme Court was sustained. *In re Assessment of Western Union Telegraph Co.*, 29 Okla. 483, 118 Pac. 376. The cases now come on to be heard upon exceptions to the report of the referee filed by the Attorney General on behalf of the state. In appointing the referee, the court directed him to make findings of fact and conclusions of law upon all the issues involved.

The only question involved relates to the valuation placed upon the property of the company by the Board of Equalization for the purpose of taxation. Section 8, art. 10, of the Constitution, provides that all property which may be taxed *ad valorem* shall be assessed at a price it would bring at a fair, voluntary sale; and section 7585, Comp. Laws 1909, provides that the property of all public service corporations shall be assessed annually by the State Board of Equalization in the manner prescribed in this act. The state board found the cash value of the company's property to be \$1,235,730 for the year ending June 30, 1911, and

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\$1,450,684 for the year ending June 30, 1912, instead of the much lower valuations shown by returns made by the company. The referee "recommends that the assessed valuation of the Western Union Telegraph Company for the fiscal year ending June 30, 1911, should be \$411,910.05, and for the fiscal year ending June 30, 1912, should be \$414,481.25." The valuations found by the referee approximate those returned by the company, and are based upon "the price the physical property of the company would bring at a fair, voluntary sale, aside from any intangible value gained by its being a part of a system extending into and through other states and countries." The items making up these aggregates are so many miles of pole lines, worth so much; so many miles of iron wire, worth so much; so many miles of copper wire, worth so much; instruments valued at so much, and office furniture, valued at so much, from which total 50 per cent. of the original cost was deducted for depreciation. The referee seems also to have been influenced in reaching his conclusion by the fact that the Corporation Commission in a controversy between the Western Union Telegraph Company and the state with respect to the rates charged by it for transmitting messages fixed the value of its property for the year 1908 for rate making purposes at approximately the same figure. In one of his findings he "concludes as a matter of law that the valuation of property for the purpose of rate making within the state, and the valuation of property for the purposes of taxation should be one and the same." There is no conflict in the evidence on any material point, the only controversy arising out of the method of computation adopted by the referee in reaching his conclusion.

The Attorney General denies that the state in exercising its taxing power is limited to assessing the material things used by the Western Union Telegraph Company, or that it is required to regard them as of no greater value than they had when reposing in the lumber yards and factories with cost added for putting them in place. He contends that the property of the company within this state ought to be assessed for taxation at such value as it has as an organic portion of a larger whole regarded not abstractly or locally, but as part of a system operating in prac-

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tically every state in the Union; that it was error to value the property of the company merely as a congeries of unrelated items, without augmentation of value from the business in which it is employed, and to refuse to value it in its organic relations, "that is to say, not as so many poles, so much wire, so many instruments, or so much other property in the abstract, but valued in the concrete, in the relation that such property in the abstract bore to other property in the abstract which being brought into relation to each other. into a system, located partly in this state and partly in other states, giving each part a concrete value, which is much greater than its abstract value."

The court is of the opinion that the conclusions of the referee cannot be sustained, and they are, therefore, set aside, and, as there is no conflict in the evidence adduced before him, the court examines the same, and bases its findings and conclusions herein thereon. In the first place, it was error to base the value of the company's property within the state upon what it would bring at a fair, voluntary sale, aside from any intangible value gained by its being a part of a system extending into and through other states and countries; and in the second place, we can find no evidence to justify the conclusion that the physical property of the company has depreciated 50 per cent. of its original cost, and is therefore at this time to be valued at half that figure. The Western Union Telegraph Company pretends to be, and is, a great and highly efficient transmission company, with offices in practically every city, town, or village in every state of the Union. There is nothing to indicate that any part of its property is in a state of decay, or that the efficiency of the company is not as great at the present time as it has been at any time since its organization. It is probably true that its physical instrumentalities depreciate in value from use and the ravages of time, but such depreciations are always provided for by replacements paid for out of net earnings, so that the plant of the company as a whole is always kept up to the ordinary standard of efficiency. In the absence of evidence to the contrary, we think this is the correct status to give to a company of this kind in attempting to determine the value of its property for the purpose of taxation.

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X It has been many times held that, "as to railroad, telegraph, express, and sleeping car companies engaged in interstate commerce, their property, in the several states through which their lines or business extend, may be valued as a unit for the purpose of taxation, taking into consideration the uses to which it is put, and all the elements making up aggregate value; and a proportion of the whole, fairly and properly ascertained, as by taking that part of the value of the entire road which is measured by the ratio of its length in the state to its total length, or by taking as the basis of assessment such proportion of the value of the company's entire capital stock as the length of its line in the state bears to the whole length of its lines, may be taxed by the state without violating any federal restrictions." 1 Cooley on Taxation (3d Ed.) 163; *Western Union Telegraph Company. v. Atty. Gen. of Mass.*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *Pullman's Palace Car Co. v. Penn.*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613; *Atty. Gen. v. Western U. Tel. Co.*, 141 U. S. 40, 11 Sup. Ct. 889, 35 L. Ed. 628; *Maine v. Grand Trunk R. Co.*, 142 U. S. 217, 12 Sup. Ct. 121, 163, 35 L. Ed. 994; *Pittsburg C., C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031; *Cleveland, C., C. & St. L. R. Co. v. Backus*, 154 U. S. 439, 14 Sup. Ct. 1122, 38 L. Ed. 1041; *Western U. Tel. Co. v. Taggart*, 163 U. S. 1, 16 Sup. Ct. 1054, 41 L. Ed. 49; *Adams Exp. Co. v. Ohio St. Auditor*, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683; *Id.*, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965; *Adams Exp. Co. v. Ky.*, 166 U. S. 171, 17 Sup. Ct. 527, 41 L. Ed. 960; *Pullman's Palace Car Co. v. Twombly* (C. C.) 29 Fed. 658; *Atty. Gen. v. Western U. Tel. Co.* (C. C.) 33 Fed. 129; *Pullman's Palace Car Co. v. Board of Assessors* (C. C.) 55 Fed. 206; *Board of Assessors v. Pullman's Palace Car Co.*, 60 Fed. 37, 8 C. C. A. 490; *Reinhart v. McDonald* (C. C.) 76 Fed. 403; *Wells Fargo & Co. Exp. Co. v. Crawford County*, 63 Ark. 576, 40 S. W. 710, 37 L. R. A. 371; *Cleveland, C., C. & St. L. R. Co. v. Backus*, 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729; *Pittsburg, C., C. & St. L. R. Co. v. Backus*, 133 Ind. 625, 33 N. E. 432; *Evansville & I. R. Co. v. West*, 138 Ind. 697, 37 N. E. 1012; *Western U. Tel. Co. v. Taggart*, 141 Ind. 281, 40

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N. E. 1051, 60 L. R. A. 671; *State v. Adams Exp. Co.*, 144 Ind. 549, 42 N. E. 483; *State v. Jones*, 51 Ohio St. 492, 37 N. E. 945; *Pullman's Palace Car Co. v. Commonwealth*, 107 Pa. 156.

Indeed, the method outlined by Mr. Cooley seems to be the plan generally adopted by the states for the ascertainment of the value of corporate property for the purpose of taxation, and from the numerous authorities we have had occasion to examine we find no precedent supporting the method adopted by the referee in the instant cases.

The case of *Western U. Tel. Co. v. Taggart*, *supra*, was appealed to the Supreme Court of the United States. *Western U. Tel. Co. v. Taggart*, 163 U. S. 1, 16 Sup. Ct. 1054, 41 L. Ed. 49. In that court Mr. Justice Gray, after quoting exhaustively from *Railroad Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031, which involved the taxation of the property of an interstate railroad running through two or more states, says:

“All that is thus forcibly and convincingly said as to the taxation of interstate railroad property is equally applicable to the taxation of interstate property. It is not easy to see how one mile of appellant's telegraph line connecting Chicago with New York could be of less value than any other mile of the same line. Cut out one mile, even though it be through a swamp or under a lake, and the value of the whole line is practically destroyed. The property is a unit, valuable as a whole and by reason of its several connections, and not by virtue of any part taken by itself. No way, therefore, by which the value of the lines in this state can be determined, seems so just and equitable as to take that proportion of the whole value which the mileage in this state bears to the whole mileage.”

Western U. Tel. Co. v. Gottlieb, 190 U. S. 412, 23 Sup. Ct. 730, 47 L. Ed. 1116, is another case wherein the proper method of determining the value of the property of the same telegraph company for the purpose of taxation was under discussion. The case originated in the circuit court of Jackson county, Mo., and the trial court followed the same plan followed by the referee in this case in that it regarded the poles, wires, and other physical property of the company in Missouri as though it was in no way used in the business of the company as part of a unit. Criticising this method, Mr. Justice McKenna, says:

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"The necessary consequence was and is to destroy the relations between that franchise and other properties of the plaintiff in error, regarding them not as parts of the system, but abstractly regarding the poles not differently from other poles, the wire not differently from other wire."

Speaking of the action of the Supreme Court of the state which reversed the trial court, the learned Justice says:

"The Supreme Court, on the contrary, regarded the properties as related and as constituting a system, and because of this relation having a value greater than the sum of values of the individual things regarded merely as such. Viewing the order of the Board of Equalization as the Supreme Court viewed it, was it valid? In other words, is the state in exercising its taxing power limited to assessing the mere material things used by the plaintiff in error, and must it regard them of no greater value than they had when they reposed in lumber yards and factories, with cost added for putting them in place? Or the proposition may be stated another way, which better expresses the ultimate contention of the plaintiff in error. Conceding that the tangible property of the telegraph company derives value from its use in a system, does the company do business in the state in pursuance of the Constitution of the United States and the Act of July 24, 1866 [c. 230, 14 St. at L. 221 (U. S. Comp. St. 1901, p. 3579)], and become thereby an instrument of interstate commerce and a government agent, and as such exempt from the taxation contested in this case?"

The conclusion of the court is stated in the syllabus as follows:

"In estimating, for purposes of taxation, the value of the property of a telegraph company situate within a state, it may be regarded not abstractly or strictly locally, but as a part of a system operated in other states, and the taxing state is not precluded from taxing the property because it did not create the company or confer a franchise upon it, or because the company derived rights or privileges under the Act of Congress of 1866, or because it is engaged in interstate commerce."

This mode of division has been recognized by the Supreme Court of the United States several times as eminently fair. And the same great court is authority for the statement that a division of the values of the entire property upon a mileage basis is the general answer to the question, How can equity be secured between the states in the matter of taxation of the property of trans-

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portation and transmission companies engaged in interstate commerce? And that taxing a mileage share of such property lying within the control or jurisdiction of each state is not taxing property outside of the state. *Railroad Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031. The case of *Fargo v. Hart*, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. Ed. 761, has sometimes been erroneously regarded as containing a complete reversal of this rule. Counsel for appellant cite it to support their contention that inasmuch as the evidence shows that certain property of the company, such as real estate, personal property, etc., which goes to make up the aggregate assets of the company, has a *situs* outside the state, that the aggregate of this sum should be deducted from the total assets, and not considered in determining the value of the property of the company within the state. We do not believe that this contention is correct, or that it is supported by the case cited. As was said by Mr. Justice Jaggard in *State v. Western U. Tel. Co.*, 96 Minn. 13, 104 N. W. 567:

“The limitation that case contains is that a tax on an express company of another state proportioned to mileage is bad when it appears that the total valuation is made up principally from real and personal property not necessarily used in the actual business of the company, and which is permanently located in the state where the company is incorporated. The general principle remains untouched and unassailed, namely, that ‘a state may tax property, not the privilege of doing business, so as to reach the intangible value due to * * * the organic relation of the property in the state to the whole system.’”

While it may be fairly inferred from the evidence that the specific property mentioned above is not actually within the state of Oklahoma, there is no evidence tending to show that it is of exceptional value, or that it and all the other property of the company having a *situs* outside this state are not necessary for the transaction of its business, or that it is not used in connection with and in relation to its property in Oklahoma for the main or general purpose of carrying on such business. It has been held, and correctly we think, that:

“Evidence of the value of property not necessary for railroad purposes, and that parts of the corporate plant of a railroad company, including its various terminals, are of exceptional val-

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ue, is competent, and, when offered, must be given effect by the assessing board and by the court in ascertaining the value of its corporate plant in the state. But, in the absence of such evidence, the presumption is that all its property is part of its corporate plant, and that its tangible and intangible property are equally distributed throughout its mileage." (*A., T. & S. F. Ry. Co. v. Sullivan*, 173 Fed. 456, 97 C. C. A. 1.)

In another case, wherein the question of valuing corporate property for rate making purposes was under discussion, the same court, speaking through Hook, Circuit Judge, says:

"Distant connections with important commercial centers, an outlet to tidewater and the like, may affect favorably the worth of every mile of road in the system. It is general knowledge that there is an important element of value in a railroad as a whole which the part within the state, solely and separately regarded, does not possess. While the question ultimately is the value of the road within the state, the influence upon that value of things external is to be considered; and in the common judgment of men it is to some extent reflected in the amount and value of the stocks and bonds resting upon the system. Nor can it properly be said that such influence affects only the value for the interstate business of the company with which the state is not concerned in making local rates. There is too intimate a relation between commerce within the state and that among the states, and too much interdependence in their mutual growth and prosperity. A railroad system is essentially a unit and is generally so regarded. For instance, the part within the state may be assessed for local taxation at its value as an organic portion of a larger whole."

There is nothing in the record to indicate that the state board attempted to tax the property of the company outside the state, and this court gives weight to the evidence tending to show the value of its tangible or intangible property without the state, only in so far as it may have a bearing upon the ascertainment of the value of that part of its corporate plant which lies within the state.

If we adopt, then, the unit system as a guide in determining the value of the company's property within the state, we find from the evidence that its cash value is much greater than that placed upon it by the State Board of Equalization. The record, however, discloses some facts which may be properly taken into

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consideration that reasonably tend to show that the property of the company in Oklahoma is not of a fair average value. For instance: The evidence shows that the receipts of the company in Oklahoma constitute .89 of one per cent. of the entire receipts of the whole system. If the property of the company is divided upon the basis of its ability to produce income from business properly attributable to this state, we find that .89 of one per cent. of the whole receipts produces a value of the property within the state slightly in excess of that found by the state board. Looking at the evidence from another viewpoint, we find that the average earnings per mile of wire for the entire system is \$23.71; while the Oklahoma wire mileage is only \$16.63 per mile. The receipts for Oklahoma per mile are therefore only 70 per cent. of the average receipts of the whole system. The evidence shows that the property in Oklahoma is 1.26 per cent. of the entire wire mileage. As stated before, upon a strictly unit basis, this would make a value much in excess of that placed upon it by the state board. But, as it is also disclosed by the evidence that the Oklahoma mileage produces only 70 per cent. of the average receipts per mile, based upon a wire mileage basis, the state board may have properly concluded that the property of the company in this state should only be assessed in the proportion that the receipts per mile in Oklahoma bear to the average receipts of the entire system. Figuring upon that basis, we find that the actual value of the property is still slightly in excess of that found by the state board. The foregoing and other facts of the same nature have been considered and given weight by the court, and no doubt the state board was also influenced by them. On the whole we are convinced that the state board valued the property of the company according to its best judgment, with honest purpose, and that it reached as near a correct conclusion as it is possible to attain in matters of this kind. At any rate, applying any of the methods approved by the courts for determining the value of property of this class for the purpose of taxation, the evidence before us shows that the values found by the board for the respective years are approximately correct. We therefore adopt

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their findings in each case, and make them a part of the judgment of this court.

The referee made findings based upon the unit system which do not substantially differ from the values found by the court, but he also found that such values "are arrived at by an arbitrary distribution of values upon the proportionate wire mileage basis without regard to the actual value of the property other than the wires; without regard to its location, whether within or without the state, and without regard to the fact that the business in the state is conducted at a loss, and the business as a whole is conducted at a profit." It is apparent that the findings made under such circumstances do not form a sufficient basis to support a judicial determination, and they are therefore set aside, and the findings and conclusions of the court substituted therefor. The valuation of property for taxation is in its nature a judicial act. 2 Cooley on Taxation (3d Ed.) 751. And in a proceeding for that purpose wherein the value of corporate property is in dispute the judgment rendered must be based upon competent evidence, weighed in a judicial manner. There is nothing in the record tending to show that the part of this system situated in Oklahoma is not of a fair average value, or that the line is not substantially of the same value throughout, except the circumstances hereinbefore mentioned, and to which we have given due weight in reaching our conclusion.

On the question of the weight to be given to the findings of the Corporation Commission in fixing the value of the property of this company for rate-making purposes, we cannot agree with the referee. Without noticing important distinctions between the two classes of proceedings which appear to us, it is sufficient to say that the valuation fixed by the commission was for the year 1908, whilst the valuations involved herein are for the years 1911 and 1912, respectively.

"As a general rule, each annual assessment of property for taxation is a separate entity, distinct from the assessment for the next and subsequent years. What may be a proper valuation one year may not be the next year, and thus a judgment decreeing at what figure a piece of property should be assessed for purposes of taxation is not *res adjudicata* as against another valuation

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placed thereon by the proper authorities this year." (1 Cooley on Taxation [3d Ed.] 758.)

The point is made by counsel for appellant that inasmuch as the officers of the company testified, without contradiction, that the value of the property of the company within the state taken as a part of a unit, with all of the advantages, if any, that attach thereto, was not and is not worth in excess of the amount at which it was returned to the state board for the purpose of taxation, the court should give to this evidence the full credence to which unimpeached evidence is entitled. It is apparent that what the officers say on this point is merely a conclusion drawn from identically the same facts which were laid before the court and the referee. We are satisfied that the referee and the officers of the company were too much influenced by the fundamentally erroneous theory that the physical valuation plan adopted by them is the correct way to ascertain the value of the property of the company in the state, and that they gave undue weight to the evidence touching the earning capacity of the company within the state, and the valuation placed upon its property for rate-making purposes. While we are of the opinion that those are matters which properly may be taken into consideration, the court, after giving them due weight in connection with all the other pertinent facts and circumstances disclosed by the evidence, has reached a different conclusion, and, of course, the court is not permitted to yield its own judgment.

The findings of the state board are therefore affirmed.

All the Justices concur.

Smith v. Alva State Bank.

SMITH v. ALVA STATE BANK.

No. 4074. Opinion Filed March 11, 1913.

(130 Pac. 916.)

APPEAL AND ERROR—Petition in Error—Amendment—Motion for New Trial—Euling. An assignment of error to the effect that the court below erred in overruling a motion for a new trial is a new and distinct assignment of error; and a petition in error in the Supreme Court cannot be amended by incorporating such assignment therein after the statutory time for perfecting an appeal has expired.

(Syllabus by the Court.)

*Error from Woods County Court;
Wm. Bickel, Judge.*

Action between Ike Smith and the Alva State Bank. From a judgment in favor of the latter, the former brings error. Dismissed.

Chase & Stevens, for plaintiff in error.

E. W. Snoddy, for defendant in error.

HAYES, C. J. Judgment was rendered in the court below in this cause on the 22d day of May, 1911. A motion for a new trial was overruled on the 28th day of the following December. Plaintiff in error brought this proceeding in error by filing in this court on the 12th day of June, 1912, his petition in error and case-made and causing summons to be issued.

The order from which he appeals is the order of the trial court overruling his motion for a new trial; but he fails to assign in his petition in error as one of his assignments of error this act of the court. At the time of the overruling of the motion for a new trial, chapter 18, p. 35, Sess. Laws 1910-11, was in force. By this act, all proceedings in error for reversing, vacating, or modifying final orders are required to be commenced in this court within six months from the rendition of the judgment or order complained of. Without assigning as error the overruling of the

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motion for a new trial, no questions relating to errors alleged to have occurred in the progress of the trial in the lower court are presented for review by the petition in error. *Meyer v. James*, 29 Okla. 7, 115 Pac. 1016; *McDonald v. Wilson*, 29 Okla. 309, 116 Pac. 920; *Cox v. Lavine*, 29 Okla. 312, 116 Pac. 920.

Plaintiff in error on July 27, 1912, filed his application asking leave to amend his petition in error, assigning as one of the grounds therein the action of the court in overruling his motion for a new trial. This application, however, was not made until after the expiration of the time the statute allows for bringing his proceeding in error; and, under the rule settled by several decisions, amendments after the expiration of such time, which constitute new allegations of error, cannot be made. *Haynes v. Smith*, 29 Okla. 703, 119 Pac. 246.

It follows that the motion to dismiss should be sustained.

KANE, DUNN, and TURNER, JJ., concur; WILLIAMS, J., not participating.

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No. 4195. Opinion Filed March 11, 1913.

(130 Pac. 934.)

APPEAL AND ERROR—Making and Serving Case-Made—Extension of Time. The trial judge, after the time for making and serving a case-made, as previously extended by the court, has expired, has no power to extend further the time for making and serving a case.

(Syllabus by the Court.)

Error from Superior Court, Oklahoma County;
Edward Dewes Oldfield, Judge.

Action by H. S. Hurst and others against Agnes P. Wheeler. Judgment for the latter, and the former bring error. Dismissed.

H. S. Hurst and W. F. Harn, for plaintiffs in error.

Stuart, Cruce & Gilbert, for defendant in error.

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HAYES, C. J. On the 18th day of April, 1912, which was within the time theretofore granted to plaintiffs in error by the court for making and serving case-made, they obtained from the judge of the court an order further extending their time for making and serving such case-made for a period of 30 days from the 30th day of April, 1912. On the 11th day of June, 1912, upon agreement of the parties, an order was made by the judge as of date of May 18, 1912, by which plaintiffs in error were granted a further extension of time of fifteen days from the 20th day of May, 1912, for the purpose of making and serving their case-made. On June 5, 1912, the time was extended for the further period of five days from that date. The case was served on June 10th.

A motion to dismiss is now urged, upon the grounds that the court was without power to make the *nunc pro tunc* order, and that the last order of extension, made on June 5th, was made after the expiration of the time granted by the previous order. Assuming, without deciding, that the judge had power to order the clerk to enter the *nunc pro tunc* order extending the time for a period of fifteen days from May 20th, the motion must still be sustained, for the reason that the time granted under said order expired on June 4th, and the last order extending the time was made subsequent thereto.

It is urged by counsel for plaintiffs in error that the time asked for, under the language of their application presented to the court at the time of the making of the *nunc pro tunc* order, did not expire until June 5th. If there were ambiguity in the order of the court as to the period of time granted, we should probably be justified in looking to the application for aid in construing the order; but the order of the court is plain and unambiguous, and definitely states that the extension of time is for a period of fifteen days from the 20th day of May, 1912, which time expired on June 4th. The last order of extension, made on June 5th, was therefore after the expiration of the period of time theretofore granted, and service of the case-made within the period of time granted was likewise void. *Turley v. Hayes & Shirk*,

Hawkins et al. v. Hawkins et al.

28 Okla. 655, 115 Pac. 769; *Maddox v. Drake*, 27 Okla. 418, 112 Pac. 969; *Ellis et al. v. Carr*, 25 Okla. 874, 108 Pac. 1101.

The motion to dismiss is sustained.

KANE, DUNN, and TURNER, JJ., concur; WILLIAMS, J., not participating.

HAWKINS *et al.* v. HAWKINS *et al.*

No. 4198. Opinion Filed March 11, 1913.

(130 Pac. 926.)

APPEAL AND ERROR—Parties—Joinder—Service. On appeal all parties to the judgment which it is sought to reverse whose interests will be affected by a reversal of the judgment must either join in the prosecution of an appeal, or be made parties defendant and be brought into this court by service of summons, where they do not voluntarily appear.

(Syllabus by the Court.)

Error from District Court, Wagoner County;
R. C. Allen, Judge.

Action by William Hawkins and another, by their guardian, James H. Kennedy, against Joseph Hawkins, Sr., and others. Judgment for plaintiffs, and defendants bring error. Dismissed.

Thomas, Thomas & Thomas, for plaintiffs in error.

Rittenhouse & Drake, for defendants in error.

HAYES, C. J. This action was brought originally in the district court of Wagoner county by William Hawkins and Mack Hawkins, minors, by their guardian, against Joseph Hawkins, Sr., A. F. Parkinson, Matt Steil, Continental Land Company, Cass M. Bradley, Peter Hawkins, Tommie White, and Richie White, and Walter White, for the purpose of quieting title to a certain tract of land and for obtaining a decree of partition. The land involved was originally allotted to Leah Hawkins, a Creek freedman, who died intestate in 1902, and said land thereupon descended to her heirs, under the laws of descent and distribution

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of the Creek Tribe of Indians. Joseph Hawkins, Sr., appearing as one of the plaintiffs in error in this proceeding, and who, in fact, is the only plaintiff in error, was the husband of said deceased allottee. Peter Hawkins, Tommie White, Richie White, and Walter White were heirs at law of decedent, and the remainder of the defendants in the trial court named above acquired their interests by purchase from other heirs of deceased. The decree of the trial court found the interests of each of the parties in the land involved and decreed a partition thereof. It was found that Joseph Hawkins, Sr., plaintiff in error, inherited an undivided one-tenth interest, but that he had sold and conveyed said interest to his codefendant, Peter Hawkins, and therefore, at the time of the trial, had no interest whatever in the land. The commissioners who were appointed to partition the land and report to the court, after making investigation, reported that the land could not be partitioned in kind to the various persons interested without manifest injury to them, and thereafter the court ordered that the land be advertised and sold, which was done; and after the purchaser paid into the court the sum of \$4,010 as the purchase price the sale was confirmed, and the proceeds thereof distributed among the interested parties. Some nine months thereafter plaintiff in error Joseph Hawkins, Sr., filed a motion to vacate and set aside the judgment of the trial court, finding the interests of the respective parties in the land and decreeing a partition thereof, and the order confirming the sale, upon the sole ground that the trial court was without jurisdiction to make such order. It is from the order overruling this motion to vacate and set aside that this proceeding in error is prosecuted. Joseph Hawkins, Sr., who files this petition in error, has joined with him all of defendants in the trial court, and attempts to prosecute the proceedings against the two plaintiffs in that court; but it is made to appear that he has joined his codefendants as plaintiffs in error here without their knowledge or consent, and it is upon the motion of two of them to dismiss this proceeding that the cause is now pending.

Under the undisputed facts Joseph Hawkins, Sr., is the only person who has undertaken to prosecute an appeal. Assuming,

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without deciding, that the order from which he attempts to appeal is an appealable order, his appeal, nevertheless, must be dismissed; for the relief he seeks cannot be granted without affecting the interests of his codefendants who are parties to the judgment of the lower court. It is well settled that on appeal all parties to the judgment which it is sought to reverse whose interests will be affected by a reversal of the judgment must either join in the prosecution of the appeal, or be made parties defendant and brought into this court by service of summons, where they do not voluntarily appear. *John v. Paullin*, 24 Okla. 636, 104 Pac. 365; *Weisbender v. School Dist. No. 6, Caddo County*, 24 Okla. 173, 103 Pac. 639. It is clear that to vacate and set aside the judgment of the trial court, ordering a partition, sale and confirming the sale thereafter made, and distributing the proceeds thereof, would affect the interests of plaintiff in error's codefendants in the trial court, and whom, without their consent, he has attempted to make coplaintiffs in error here.

The motion to dismiss is sustained.

KANE, DUNN, and TURNER, JJ., concur; WILLIAMS, J., not participating.

POWELL, *et al.* v. JOHNSON-LARIMER DRY GOODS
CO. *et al.*

No. 4396. Opinion Filed March 11, 1913.

(130 Pac. 945.)

1. **APPEAL AND ERROR—Writ of Error—Filing—Time.** By reason of chapter 18, p. 35, Sess. Laws 1910-11, this court is without jurisdiction to entertain an appeal commenced in this court more than six months after the rendition of the judgment or final order complained of.
2. **SAME—Perfecting Appeal—Time.** The time within which to perfect an appeal under said statute dates from the rendition of the judgment or order appealed from, and not from the entry thereof.

(Syllabus by the Court.)

Error from Superior Court, Custer County:
J. W. Lawter, Judge.

Action between H. C. Powell and another and the Johnson-Larimer Dry Goods Company and others. Judgment in favor of the latter, and the former bring error. Dismissed.

M. L. Holcombe, for plaintiffs in error.

A. J. Welch, for defendants in error.

HAYES, C. J. A motion to dismiss this appeal upon several grounds has been filed. We need to notice only one of the grounds urged. Judgment was rendered in the court below on March 13, 1912. On the 18th day of the same month a motion for a new trial was overruled. A journal entry overruling the motion for a new trial was agreed to and filed and entered on the 27th day of the same month. The petition in error was filed in this court on the 26th day of September, 1912, more than six months from the date of the overruling of the motion for a new trial, and hence after the time allowed by chapter 18, p. 35, Sess. Laws 1910-11, which provides that "all proceedings for reversing, vacating or modifying judgments, or final orders, shall be com-

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menced within six months from the rendition of the judgment or final order complained of."

It is well settled that this court is without jurisdiction to entertain an appeal that is not commenced within the statutory time for commencing same. *Healy v. Davis*, 32 Okla. 296, 122 Pac. 157; *Fairbanks-Morse & Co. v. Thurmond*, 31 Okla. 612, 122 Pac. 167.

Nor does the fact that the entry of the order overruling the motion for a new trial did not occur until several days after the rendition of the order have the effect to extend the time in which to perfect the appeal; for the statute provides that the time shall commence to run from the "rendition of the judgment or order complained of," and not from the entry of such judgment or order. *Iliff v. Arnott*, 31 Kan. 672, 3 Pac. 525; *Brown v. Clark et al.*, 31 Kan. 521, 3 Pac. 415; 2 Cyc. 797.

The appeal is therefore dismissed.

All the Justices concur.

THORNE v. HARRIS.

No. 4465. Opinion Filed March 11, 1913.

(130 Pac. 906.)

APPEAL AND ERROR—Time for Taking Proceedings—Dismissal. The judgment sought to be reversed was rendered April 5, 1912. Proceedings in error to review the same were commenced in this court October 21, 1912, and not within six months after the rendition of said judgment, as required by an act approved February 14, 1911 (Laws 1910-11, c. 18). On motion, the cause is dismissed.

(Syllabus by the Court.)

Error from District Court, Caddo County;
Frank M. Bailey, Judge.

Action between R. A. Thorne, administrator, and Alice Harris. From the judgment, the administrator brings error. Dismissed.

Middleton et al. v. Escoe et al.

Bristow & McFadyen, for plaintiff in error.

C. H. Carswell, for defendant in error.

PER CURIAM. For the reason that this suit was brought in the lower court February 21, 1912, and the judgment sought to be here reviewed was rendered and entered April 5, 1912, and proceedings in error were not commenced in this court until October 21, 1912, and not within six months after the rendition of said judgment, as required by an act approved February 14, 1911 (Laws 1910-11, c. 18), which went into effect June 10, 1911, the motion to dismiss this cause is sustained. *Holcombe v. Lawyers' Co-Op. Pub. Co.*, ante, and cases cited; *Grant v. Creed et al.*, ante, 128 Pac. 511, and cases cited. It is so ordered.

MIDDLETON *et al.* v. ESCOE *et al.*

No. 4480. Opinion Filed March 11, 1913.

(130 Pac. 905.)

APPEAL AND ERROR—Proceedings for Review—Parties. The first section of the syllabus in *John v. Paulin et al.*, 24 Okla. 636, 104 Pac. 365, is made the syllabus in this case.

(Syllabus by the Court.)

Error from District Court, Muskogee County;
R. P. de Graffenried, Judge.

Action by 'Eddie Escoe, by Bert E. Nussbaum, his legal guardian, against Drury H. Middleton and others. From the judgment, the defendants Middleton bring error. Dismissed.

Kline & Gotwals, for plaintiffs in error.

Harlow A. Leekley and *John B. Meserve*, for defendant in error Eddie Escoe.

W. F. Rampendahl, for defendant in error W. H. Bateman.

TURNER, J. On June 12, 1911, the defendant in error Eddie Escoe, a minor, by his guardian, sued Drury H. Middleton.

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Frances W. Middleton, and W. H. Bateman in ejectment for his allotment in the district court of Muskogee county and for mesne profits. By amended petition, for a second cause of action, he alleged that defendants claimed some right, title, or interest in the land, the precise nature of which he did not know, and prayed that they be required to exhibit all evidence thereof to the court, that his title to the land be cleared, and they forever barred from setting up any claim thereto. After issue joined there was trial to the court upon an agreed statement of facts; whereupon the court found, in effect, that the Middletons were in possession and relied for title upon certain deeds executed by the plaintiff to them during his minority, and that Bateman was not in possession and asserted a lien only upon the land by virtue of a mortgage executed by plaintiff during his minority for \$690, payment of which the Middletons had assumed as part of purchase price; that \$250 of said \$690 had gone in betterments on the land; and that the rents and profits offset any claim that the Middletons might have thereto. Accordingly, on April 27, 1912, it was ordered, adjudged, and decreed by the court that plaintiff have judgment against the Middletons for possession of the land; that their deeds be canceled; that Bateman "should have and recover of and from the plaintiff Eddie Escoe the sum of \$250 as the value of the improvements which were placed upon the lands involved herein," etc.; "that as a condition precedent to the cancellation of the said mortgage, said Eddie Escoe should be required to pay to said W. H. Bateman the sum of \$250," etc.; "and for good cause shown, said defendants, Drury H. Middleton and Frances W. Middleton, are hereby granted 90 days from this date within which to serve a case-made upon the plaintiff."

As no extension of time was granted in which to serve a case-made upon Bateman, and the same was not served on him within three days as required by Comp. Laws, sec. 6075, and not until July 23, 1912, the motion to dismiss must be sustained; that is, if Bateman is a necessary party to this proceeding which is prosecuted alone by the Middletons. We think he is, for the reason that, not appealing, we presume he is satisfied to accept the \$250 which plaintiff is decreed to pay him as a condition precedent

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to setting aside his mortgage, and hence his interests would be adversely affected should the Middletons' appeal result in a reversal of that decree. The rule is:

"All parties to an action whose interests will be affected by a reversal of the judgment appealed from must be made parties to the appellate proceeding." (*John v. Paullin*, 24 Okla. 536, 104 Pac. 365.)

And this, too, although Bateman thereafter waived his right to suggest amendments, consented that the case-made be settled without notice, and waived issuance and service of summons in this court. *Bank v. Mergenthaler, etc., Co.*, 31 Okla. 533, 122 Pac. 507. Dismissed.

All the Justices concur.

BOND, *Treasurer of Atoka County, et al.* v. WATSON *et al.*

No. 4508. Opinion Filed March 11, 1913.

(130 Pac. 933.)

APPEAL AND ERROR—Case-Made—Preparation—Service—Time—Extension. Appeal dismissed for failure to serve case-made in time.

(Syllabus by the Court.)

Error from District Court, Atoka County;

Robt. M. Rainey, Judge.

Action between Henry J. Bond, as Treasurer of Atoka County, and the Board of County Commissioners of such county, and Pete Watson and another. From a judgment in favor of the latter, the former bring error. Dismissed.

J. W. Jones, Co. Atty., *I. L. Cook*, and *W. S. Farmer*, for plaintiffs in error.

J. G. Ralls, for defendants in error.

KANE, J. This cause comes on to be heard upon a motion to dismiss the appeal, upon the ground, among others, that "the judgment in the trial court from which this appeal is prosecuted

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was rendered on the 8th day of May, 1912, and the plaintiffs in error were given 90 days' extension of time in which to prepare and serve case-made upon the defendants in error, and the plaintiffs in error failed to serve case-made upon these defendants in error within said 90 days, but, without notice to these defendants in error, they did, on the 8th day of August, 1912, secure an order from the trial judge extending the time 60 days from the 8th day of August, 1912; but at the time said extension was granted the 90 days previously granted had expired, and the order of the court entered on the 8th day of August, 1912, being after the 90 days had expired, rendered all extensions of time a nullity." This is a sufficient ground for dismissal.

The motion to dismiss must therefore be sustained.

WILLIAMS, DUNN, and TURNER, JJ., concur; HAYES, C. J., absent, and not participating.

HONLEY *et al.* v. FIRST NAT. BANK OF HOLDENVILLE.

No. 4726. Opinion Filed March 11, 1913.

(130 Pac. 945.)

APPEAL AND ERROR—Time for Taking Proceedings—Dismissal. Under chapter 18, p. 35, Sess. Laws 1910-11, proceedings in error in the Supreme Court must be brought within six months from the date of the rendition of the judgment or order from which the appeal is sought to be taken; and when not so brought this court is without jurisdiction, and the same will be dismissed.

(Syllabus by the Court.)

Error from District Court, Seminole County;
Tom D. McKeown, Judge.

Action between Frank Honley and another and the First National Bank of Holdenville. From the judgment, Honley and another bring error. Dismissed.

D. O. Jennings and J. A. Baker, for plaintiffs in error.

Warren & Miller, for defendant in error.

First Nat. Bank of Hennessey v. Harding.

DUNN, J. This case presents error from the district court of Seminole county, and is brought for the purpose of having reviewed errors alleged to have occurred on the trial of the cause. The motion for a new trial was denied on June 24, 1912, and the petition in error was not filed in this court until January 13, 1913, or a period of more than six months from the rendition of the judgment or order of which complaint is made. Chapter 18, Sess. Laws 1911, p. 35, provides that "all proceedings for reversing, vacating or modifying judgments, or final orders shall be commenced within six months from the rendition of the judgment or final order complained of." Under the foregoing statute the motion to dismiss the appeal filed by the defendant in error must be sustained, as the statutory period within which an appeal is allowable had expired when it was filed. See *Healy v. Davis*, 32 Okla. 296, 122 Pac. 157; *Rolater v. Strain*, 31 Okla. 58, 119 Pac. 992; *Fairbanks-Morse & Co. v. Thurmond et al.*, 31 Okla. 612, 122 Pac. 167; *Lewis v. Kidd*, 33 Okla. 628, 127 Pac. 257; *Brooks et al. v. United Mine Workers of America et al.* (not yet officially reported), 128 Pac. 236.

The appeal is accordingly dismissed.

HAYES, C. J., and KANE and TURNER, JJ., concur;
WILLIAMS, J., absent, and not participating.

FIRST NAT. BANK OF HENNESSEY v. HARDING.

No. 4772. Opinion Filed March 11, 1913.

(130 Pac. 905.)

APPEAL AND ERROR—Parties—Garnishee. Where it is sought to reverse an order discharging garnishees from liability, they must be made parties to the proceedings in this court; and a petition in error to which the principal defendants alone are made parties will be dismissed.

(Syllabus by the Court.)

Error from District Court, Kingfisher County;
James B. Cullison, Judge.

Opinion of the Court.

Action by First National Bank of Hennessey, Oklahoma, against A. M. Harding. From an order discharging a garnishee, plaintiff brings error. On motion to dismiss. Granted.

P. S. Nagle, for plaintiff in error.

F. L. Boynton, for defendant in error.

DUNN, J. This case presents error from the district court of Kingfisher county. Plaintiff in error seeks to have reviewed an order of the district court which discharged a garnishee. The only parties made plaintiff and defendant in error are the original parties to the action, and counsel for defendant in error have filed a motion to dismiss the proceeding for the reason that the garnishee was not made a party. That all parties who will be affected by the judgment of this court must be made parties in this court is fundamental, and the Supreme Court of Kansas, passing on this specific question in the case of *Yerkes v. McGuire et al.*, 54 Kan. 614, 38 Pac. 781, held that:

"Where it is sought to reverse an order discharging garnishees from liability, they must be made parties to the proceedings in this court; and a petition in error to which the principal defendants alone are made parties will be dismissed."

This case was afterwards followed by this court in the case of *Spaulding Mfg. Co. v. Dill et al.*, 25 Okla. 395, 106 Pac. 817.

The motion to dismiss is sustained.

All the Justices concur.

INDIAN LAND & TRUST CO. *et al.* v. WIDNER.

No. 2701. Opinion Filed February 11, 1913.

Rehearing Denied March 13, 1913.

(130 Pac. 531.)

APPEAL AND ERROR—Briefs—Effect of Defects. Where the brief of plaintiffs in error fails to contain specifications of error complained of, separately set forth and numbered, and argument and authorities in support thereof stated in the same order, as required by rule 25 of this court (20 Okla. xii, 95 Pac. viii), the appeal will be dismissed.

(Syllabus by the Court.)

*Error from District Court, Hughes County;
John Caruthers, Judge.*

Action between the Indian Land & Trust Company and others and R. W. Widner. From the judgment, the Indian Land & Trust Company and others bring error. Dismissed.

Lewis C. Lawson, for plaintiffs in error.

Mann, Rogers & Harris, for defendant in error.

WILLIAMS, J. On August 2, 1911, counsel for defendant in error filed a motion in this court to dismiss this proceeding in error for the reason that the brief of plaintiffs in error, filed in this cause, fails to comply with rule 25 of this court. On August 1, 1911, counsel for plaintiffs in error accepted service of copy of said motion, and on September 30, 1911, filed a reply brief to the brief of the defendant in error, but in no way attempted to bring the brief in chief within said rule 25.

In *Arkansas Valley National Bank v. Clark*, 31 Okla. 413, 122 Pac. 135, the syllabus is as follows:

"Rule 25 of the Supreme Court (20 Okla. xii, 95 Pac. viii), which provides that in all cases, except felonies, the brief of the plaintiff in error, in substance, shall set forth the material parts of the pleadings, proceedings, and facts upon which reliance is had for reversal, so that no examination of the record itself need

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be made in said court, and shall also contain specifications of the errors complained of, separately set forth and numbered, is mandatory; and where it is not observed, and counsel for the defendant in error in his brief insists that such rule has not been complied with, and the plaintiff in error, making no request for permission to amend its brief, permits said cause to be submitted with the briefs in that condition, the alleged errors will not be reviewed."

In *Reynolds v. Phipps et al.*, 31 Okla. 788, 123 Pac. 1125, paragraph 1 of the syllabus is as follows:

"Where brief of plaintiff in error fails to contain specifications of error complained of, separately set forth and numbered, and argument and authorities in support thereof stated in the same order, as required by rule 25 of this court (20 Okla. xii, 95 Pac. viii), the appeal may be dismissed."

See, also, *Lawless v. Pitchford*, 33 Okla. 633, 126 Pac. 782; *Fire Association of Philadelphia v. Bryant & Whistler et al.*, 33 Okla. 698, 127 Pac. 699.

The plaintiffs in error in their brief utterly failed to make specifications of error, as required by said rule.

The motion to dismiss must be sustained.

All the Justices concur.

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No. 3299. Opinion Filed December 3, 1912.

(130 Pac. 300.)

On Rehearing, March 10, 1913.

1. **APPEAL AND ERROR—Joint Judgment—Parties.** All parties to a joint judgment must be joined in a proceeding in error in this court to review such judgment, either as plaintiffs or defendants in error.
2. **SAME—Service of Case-Made.** If a joint judgment is sought to be reviewed by petition in error with case-made attached, the case-made must be served upon all parties against whom the joint judgment is rendered.

(a) When such service is not had, unless all such parties waive same or do acts that amount to entering an appearance at the presentation and settling of the case-made, such case-made is a nullity.

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(b) The fact that the party upon whom service was not had as to the case-made and the signing and settling of the same made default in the trial court before the joint judgment was rendered does not take the case-made, as to service, etc., out of the rule.

(Syllabus by the Court.)

*Error from District Court, Okmulgee County;
Wade S. Stanfield, Judge.*

Action by the State, on the relation of the County Attorney, against W. J. Cook and A. Z. English, administrators of the estate of F. B. Severs, deceased, and others. Judgment for plaintiff, and defendants bring error. Dismissed.

W. W. Wood and Moore & Noble, for plaintiffs in error.

J. W. Childers, Co. Atty., for defendants in error.

WILLIAMS, J. Counsel for the state of Oklahoma moves to "strike the case-made from the files and dismiss the appeal and petition in error," on the ground (1) that the case-made was neither served on James Kanard, one of the defendants in error, nor was he present at the presentation, signing, and settling of the same; nor was the presentation, signing, and settling thereof waived by him; nor did he have notice thereof; (2) that notice of the presentation, signing, and settling of the case-made was neither served on the defendant in error James Kanard or his attorney, nor was notice thereof waived by him or his attorney.

The judgment sought to be reviewed by this proceeding is a joint one, the same, however, having been rendered against James Kanard by default; the other defendants, Frederick B. Severs and Molleanna Snakaya, plaintiffs in error, having defended in the lower court. It was essential that the said James Kanard be either joined as a plaintiff or defendant in error. *May et al. v. Fitzpatrick et al.*, ante, 127 Pac. 702, and authorities therein cited.

If the judgment of the trial court was to be reviewed by means of a petition in error with case-made attached, the same should have been served upon James Kanard. *Thompson v. Fulton*, 29 Okla. 700, 119 Pac. 244; *Price v. Covington*, 29 Okla. 854, 119 Pac. 626.

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The fact that the joint judgment against Frederick B. Severs, Molleanna Snakaya, and James Kanard was rendered as to the said Kanard by default does not change the rule. *Jones v. Balsley & Rogers et al.*, 25 Okla. 344, 106 Pac. 830, 138 Am. St. Rep. 921. Such rule obtained in Kansas, whence our statute was taken (*Atlantic Trust Co. et al. v. Prescott et al.*, 5 Kan. App. 172, 48 Pac. 926; *Paper Co. v. Hentig*, 31 Kan. 322, 1 Pac. 529), until the same was changed by statute. *Jones v. Balsley & Rogers et al.*, *supra*. The appeal must be dismissed.

All the Justices concur.

ON REHEARING.

Since the filing of the opinion holding the case-made a nullity and dismissing the proceeding in error, counsel for plaintiffs in error have presented to this court a motion asking for modification of said order, "so as to provide therein only that the case-made shall be stricken from the record, and not that the appeal shall be dismissed, for the reason that it appears by the certificate of the clerk * * * that said record is duly certified as a full and complete transcript of the proceedings in the court below."

Counsel for plaintiffs in error also state that "it has been suggested that they did not, in their original brief in opposition to the motion to dismiss, call the attention of the court to the fact that errors were assigned which appeared upon the face of the record proper," and concede such to be the fact, but state that it was an oversight, and ask that we consider a motion for modification, that justice may be done their clients.

The county attorney, for the defendants in error, in reply insists that the assignments sought to be raised by transcript are without merit, and that the motion to modify should not be sustained as a matter of form, and therefore should be denied in the interest of justice. *McLaughlin et al. v. Nettleton*, 25 Okla. 319, 105 Pac. 662; *Id.*, 25 Okla. 322, 105 Pac. 663; *Young v. Severy*, 5 Okla. 630, 49 Pac. 1024.

The bond declared on is made an exhibit and a part of the pleading by proper reference. It is contended that the petition does not state a cause of action, for the reason that it is not

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therein alleged that the penalty of the bond is either due or unpaid. The breach of the bond, as alleged, is that the principal, Abe Snakaya, failed and neglected to appear in said court, and failed to remain thereat, as by said bond he was required to do; that thereupon the said bond was by said district court duly forfeited, which said forfeiture was then and there duly entered of record, whereby, and by reason thereof, this action accrued in favor of the plaintiff, the state of Oklahoma, "and the said defendants then and there became indebted to the said plaintiff the state of Oklahoma in the sum of \$5,000. Wherefore, premises considered, plaintiff prays judgment * * * for \$5,000, and for its costs laid out and expended in the prosecution of this action."

Section 5655, Comp. Laws 1909 (section 3993, St. Okla. 1893), provides:

"In the construction of any pleading, for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties."

In harmony with the spirit of said statute, it is a settled rule of construction in this jurisdiction that, where a petition is attacked for the first time in this court, for the reason that it does not state a cause of action, it will be liberally construed in order to uphold the judgment of the trial court. *Wass et al. v. Tennent-Stribbling Shoe Co.*, 3 Okla. 152, 41 Pac. 339; *Young v. Severly*, 5 Okla. 630, 49 Pac. 1024; *Bohart v. Matthews*, 29 Okla. 315, 116 Pac. 944.

Without challenging the sufficiency of the petition, the defendant (plaintiff in error) Molleanna Snakaya answered by an unverified general denial. The defendant F. B. Severs interposed a demurrer to the petition, on the ground that it did not state facts sufficient to constitute a cause of action, but waived same by securing permission of the court for its withdrawal, and then answered by an unverified general denial. The demurrer was never passed on. Had it not been withdrawn and an answer filed by permission, without it being passed on, that would constitute a waiver. The question as to the objection to the introduction of evidence in the trial court, on the ground that the petition did not state a cause of action, is not before this court on review on a

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transcript. But see *Hogan et al. v. Bailey*, 27 Okla. 15, 110 Pac. 890; *Caddo National Bank v. Moore*, 30 Okla. 148, 120 Pac. 1003. The petition, its sufficiency being questioned for the first time in this court, should be held here to sustain the judgment.

Section 5663, Comp. Laws 1909 (section 4001, St. Okla. 1893), has no application to this case, as that applies to actions founded on instruments providing for the unconditional payment of money. The instrument here under consideration was conditioned that if the principal forfeited said bail that then the sureties would pay a certain stipulated sum.

It is further insisted by the plaintiffs in error that the findings of the court, as set out in the judgment, are insufficient to support the judgment, because there is (1) no finding as to what charge the principal in the bond was to answer, nor (2) that he was bound to appear to answer any charge whatever, and (3) that there was no finding that the prisoner was discharged by reason of the giving of the bail bond, or that he was discharged at all.

Every reasonable intendment and presumption is in favor of the trial court. *National Drill & Mfg. Co. v. Davis*, 29 Okla. 625, 120 Pac. 976; *Herron v. M. Rumley Co.*, 29 Okla. 317, 116 Pac. 952; *Tate v. Stone*, *ante*, 130 Pac. 296.

We have held that, although a party is entitled to a trial by jury in a case, unless same is waived, yet, if the record in this court fails to show waiver entered of record, as required by statute, objection on that ground may not be made for the first time in this court. *Murphy v. Fitch*, *ante*, 130 Pac. 298; *Farmers' National Bank v. McCall*, 25 Okla. 600, 106 Pac. 866, 26 L. R. A. (N. S.) 217.

Section 21, art. 7, of the Constitution, provides:

"In all jury trials, the jury shall return a general verdict, and no law in force, nor any law hereafter enacted, shall require the court to direct the jury to make findings on particular questions of fact; but the court may, in its discretion, direct such special findings."

This provision of the Constitution superseded section 5805 (section 4176, St. Okla. 1893) of Comp. Laws 1909. *King v. Timmons*, 23 Okla. 407, 100 Pac. 536.

Section 5809, Comp. Laws 1909 (section 4180, St. Okla. 1893), is as follows:

"Upon the trial of questions of fact by the court it shall not be necessary for the court to state its findings, except generally, for the plaintiff or defendant, unless one of the parties request it, with the view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state, in writing, the conclusions of fact found, separately from the conclusions of law."

Neither does it appear that any findings of fact or conclusions of law were requested by plaintiffs in error nor that any attempt was made by the trial court to state, in writing, the findings of fact separately from the conclusions of law. When we examine this record carefully, we think it is obvious that no effort was made by the trial court to state, in writing, the findings of fact separate from the conclusions of law, but that the judgment was intended to be a general finding on all the issues. The substantial rights of the plaintiffs in error could not have been adversely affected by this action of the trial court in the form in which he rendered this judgment; and the effort to defeat the recovery on this bail bond by a technicality should not prevail. Section 5680, Comp. Laws 1909.

In *Stadel v. Aikins*, 65 Kan. 82, 68 Pac. 1088, it is said:

"The finding, as will be observed, is not that he had no notice of the lien, but it is that he had no actual knowledge that a lien was claimed during the time that the corn was being hauled. There is no finding that he was without constructive notice of the lien before a sale was consummated, and the general verdict implies the existence of all necessary facts not inconsistent with those special findings. The plaintiff in error has not preserved the evidence, and the findings of fact do not cover the question of notice. 'In the absence of the testimony or of a special finding upon a material question in the case, it will be presumed that the facts disclosed in evidence were such as to support the general finding and judgment of the court.' *Pennell v. Felch*, 55 Kan. 78, 39 Pac. 1023. See, also, *Kellogg v. Bissantz*, 51 Kan. 418, 32 Pac. 1090."

As it appears that the assignments of error that are reviewable by means of a transcript are without merit, the motion to

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modify the order dismissing the proceeding in error will be overruled.

All the Justices concur.

TOWN OF FAIRFAX v. GIRAUD.

No. 2386. Opinion Filed March 11, 1913.

(131 Pac. 159.)

1. **MUNICIPAL CORPORATIONS—Defective Streets—Liability.** "A municipality is relieved of liability for the defective condition of its streets only when it has no means within its control to effect repairs. But, if it has the means within its control and fails or refuses to exercise them, it will not be excused or relieved of liability."
2. **SAME—Personal Injuries—Contributory Negligence.** A person traveling on a public street of a city, which is in constant use by the public, while using the same with reasonable care and caution, has a right to presume that such street is in reasonably safe condition, and is reasonably safe for ordinary travel by night, as well as by day, throughout its entire width, and is free from all dangerous holes and obstructions.
3. **SAME—Burden of Proof.** In an action against a municipal corporation for personal injuries, there is no presumption that the plaintiff or defendant is guilty of negligence, and, in order to entitle the plaintiff to recover, it is sufficient for him to show that the defendant was guilty of negligence, with nothing in the circumstances establishing contributory negligence on his part; and, when such facts are proven, it devolves upon the defendant to prove affirmatively that the plaintiff was guilty of contributory negligence.
4. **APPEAL AND ERROR—Verdict—Conflicting Evidence.** When there is any evidence reasonably tending to support the verdict of a jury, the same will not be reversed on appeal because of evidence which may conflict therewith.
5. **DAMAGES—Personal Injuries—Excessive Recovery.** On a trial of an action to recover damages for injuries sustained on account of negligence of a town in the maintenance of its street, it appeared that plaintiff was 42 years of age and was teaching music for a livelihood; that, prior to her injuries, she earned not less than from \$12 to \$15 per week, and for five or six months thereafter was totally unable to earn anything, and since then had been able to earn only \$4 or \$5 per week; that her injuries were due to the breaking of both of the bones in one of her lower limbs, just above the ankle; that the other was badly sprained,

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and she was seriously bruised as a result of her fall, suffering intensely for several months which continued to the date of the trial. The evidence showed that her injuries were permanent and that she would probably be a cripple for life. Verdict for \$2,000 held not excessive.

(Syllabus by the Court.)

*Error from District Court, Osage County;
John J. Shea, Judge.*

Action by Kate Giraud against the Town of Fairfax. Judgment for plaintiff, new trial denied, and defendant brings error. Affirmed.

D. L. Hubler and Grinstead, Mason & Scott, for plaintiff in error.

J. M. Worten, for defendant in error.

DUNN, J. This case presents error from the district court of Osage county. On the 16th day of May, 1910, defendant in error, as plaintiff, commenced her action in the said court to recover \$8,500 for damage alleged to have been sustained by certain injuries which she suffered, due to the negligence of the town in its maintenance of one of its crossings. In her petition she alleged:

"That prior to December 1, 1909, the said defendant city, under and by virtue of its corporate power, had assumed control and authority of its streets, alleys, sidewalks, curbs, and gutters; that at said time it was in full control and management of the same; that at said time the said defendant was wrongfully, willfully, wantonly, recklessly, negligently, and carelessly permitting the crossing of the gutter from the curb line or concrete sidewalk to the street crossing at the northwest corner of the intersection of Main and Elm streets in said town, going east, to be and remain in a dangerous and unsafe condition for pedestrians to pass over, and had been so permitting it for several months; that the concrete sidewalks or curb at said point was about two feet higher than the bottom of the mud gutter over which the public had to pass to the end of the stone street crossing in going east; that the end of said stone street crossing extended west to within about three feet of said concrete sidewalk or curb, and was six inches higher than the bottom of the said mud gutter; that the only means provided by the defendant for crossing said mud

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gutter was one small stone step on the west side of same, next to the said concrete curb, which was about three feet long, about six inches high, and about a foot wide, and which was only put there for a temporary use and was not sufficiently planted or imbedded as to be solid and not tilt or turn when the weight of an ordinary grown person was thrown upon it; that the top of said step was piled up with mud nearly to a level with the top of the curb and no light at said crossing—all of which made the crossing a very dangerous and unsafe one, and all of which was well known to the defendant, its officers, agents, and employees, or ought to have been known, and could have been known by the exercise of reasonable or ordinary care, but was wrongfully, willfully, wantonly, recklessly, negligently, and carelessly permitted to be and remain in such condition, and had been permitted by said defendant to so exist for several months. Plaintiff states that in the month of November, 1909, she was temporarily located at the town of Fairfax, Okla., and that on the night of December 1, 1909, she had occasion to go east on the north side of Elm street from the west side of Main street over the crossing above described; that it was a rainy, dark night with no lights except from the business houses, which were only about sufficient to enable one to see the outlines of the walks and crossings; that she was unfamiliar with this crossing and did not know of its unsafe and dangerous condition, but supposed it was all right and safe, as it was one of the most public crossings in the city; that she proceeded to cross over said gutter from said sidewalk at the northwest corner of Main and Elm streets above set out and across said Main street; that, when she stepped from the top of the curb or sidewalk into the mud on the said stone step, she slipped and tottered, and, in her effort to regain her balance, the step gave away or turned with her and she fell upon said stone or some other hard substance and into the mud and water in the gutter, getting muddy and wet from head to foot, breaking both bones in her lower left limb, badly spraining her right ankle, and receiving such a bodily jar that she was caused to suffer the most excruciating pain in her head and body for several days; that she suffered severe pain from the broken and sprained limbs for weeks and months, and suffers yet from same; that she has had rheumatism in the broken limb all winter and spring as a result of said injury; that said broken limb is yet swollen and very weak and affected with numbness, which is very disagreeable and painful, and which disables her in getting around. Plaintiff states that her injuries are permanent; that the pain and suffering has

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been such a shock to her nervous system that the same has given away and she can never get over it."

For its answer, defendant admitted that it was a municipal corporation, incorporated on the 7th day of September, 1909, prior to which time the inhabitants of defendant town were an unincorporated community. All of the other allegations of plaintiff's petition were denied. Defendant then alleged:

"Fifth. That prior to the 7th day of September, 1909, the First National Bank of Fairfax, Okla., had caused to be built a good and substantial cement sidewalk, twelve feet wide, and a curb about fifteen inches high, along the east end of lot sixteen in block twelve in the town of Fairfax, aforesaid; that, by subscription or otherwise, the citizens of said community had built and maintained a good and substantial stone footwalk across Main street east from a point about four feet north from the southeast corner of the sidewalk above mentioned; that said footwalk was about fifteen inches below the top of the cement sidewalk mentioned, and extended to within about 24 inches of the curb heretofore mentioned; that, by donation, subscription, or otherwise, a good and substantial stone step, to wit, a stone three feet long, fourteen inches wide, and six inches thick was placed against the curb connecting with said stone footwalk; and that said stone step, street crossing, and cement sidewalk were constructed and in place and had long been used prior to the incorporation of the said town, were reasonably safe and sufficient for the purpose for which used, and that the plaintiff suffered her alleged injuries solely, purely, and exclusively by reason of her own negligence and failure to exercise ordinary care as it was her duty to do, for which reason the defendant is not liable therefor."

To the foregoing answer, plaintiff filed a reply in effect a general denial. On these issues the case was tried to a jury, which returned its verdict finding in favor of plaintiff in the sum of \$2,000. On motion for new trial being filed and denied, the case has been duly lodged in this court for review.

A number of assignments of error are made and argued by defendant in the very complete brief filed in its behalf by counsel, the first of which relates to the action of the court in striking from defendant's answer the third, fourth, and sixth paragraphs thereof, which set out, in substance, that, at the time of its incorporation, it was in possession of no funds and was without au-

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thority to levy or collect general taxes for the purpose of repairing, constructing, or otherwise improving streets, sidewalks, and crossings up to and including the 1st day of December, 1909, nor had it, prior to the said date, promulgated any resolution, by-law, or ordinance for the construction or repair of street crossings, and was wholly without funds or authority within said time to do so. That the territory contained in the town was a portion of a road district and the poll tax fund had been exhausted prior to its incorporation, and that the town could not levy general revenue taxes prior to March 1, 1910, which could not be collected for five months thereafter. For a number of reasons counsels' contention on these propositions cannot be sustained. First, the defect was of such a character that no funds or money would have been required to repair it. The proof, while controverted, was sufficient to establish the averments of the petition as to the condition of the stepping-stone. The town marshal, who testified that he was also street commissioner, with a shovel and a few moments of time, and without the expenditure of a penny, could have made firm this stone and rendered the same safe for passage. Or if for any reason the dangerous place in the highway could not have been made safe in this manner, it was the duty of the town to have closed the same to travel and not to have allowed it to remain open as a pitfall for people who at least were tacitly invited to use it.

This same question was involved in the case of *Carney et al. v. Village of Marseilles et al.*, 136 Ill. 401, 26 N. E. 491, 29 Am. St. Rep. 328, the court holding that, while a municipal corporation cannot be required to make improvements or repairs, the cost of which would be in excess of its corporate power to raise money for such purposes, yet having exclusive control of its streets, it was required by law to maintain its bridges in a reasonably safe condition, and also that:

"If for any reason, as that the cost of repair will be more than the funds at its disposal which it might, by the exercise of its corporate powers, command, the repair is impossible, the street or bridge, if known to be unsafe, should not be left open and held out to the public as safe for its use, but should be closed, and the public warned by notice of the danger of passage over the same."

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The rule seems to obtain that "a municipality is relieved of liability for the defective condition of its streets only when it has no means within its control to effect repairs. But if it has the means within its control, and fails or refuses to exercise them, it will not be excused or relieved of liability." 28 Cyc. 1343, 1344, and cases cited in notes; *Erie City v. Schwingle*, 22 Pa. 384, 60 Am. Dec. 87; *Prideaux et ux. v. City of Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558; *Hutson v. City of New York*, 7 N. Y. Super. Ct. 289, afterwards affirmed in 9 N. Y. 163, 59 Am. Dec. 526.

In the case of *Erie City v. Schwingle*, *supra*, which was a case wherein the same question arose as in the case at bar. Chief Justice Black said:

"If a mere vote of the council could have laid the tax, their disinclination to do so would hardly have been thought of as a defense. The people being their own representatives in regard to all taxation beyond a half per cent., they are bound to see to it themselves as much as the council would have been, if the matter had been intrusted to their discretion. No matter where the authority of a municipal corporation may be lodged, nor what organs may be designated to speak its will, neither the council nor the people can rid themselves of a public duty, by any vote of their own, or any refusal to vote."

In our judgment the town had at its command ample means which, had it undertaken to have exercised, would have produced for it a fund ample to remedy the defect, even conceding funds were required. Section 848, Comp. Laws 1909, provides:

"In addition to the powers heretofore granted by statute, the boards of trustees of towns and villages shall have authority to levy and collect a license tax on auctioneers, contractors," etc.

Here follows a list of virtually every species and line of employment which might be engaged in within a city or town. The statute then provides:

"The tax so levied and collected therefrom shall be applied for the use and benefit of such towns and villages as may be directed by the councils or boards of trustees thereof."

Herein was provided a ready method whereby a fund amply sufficient to have made safe the crossing where the accident herein occurred, and it was the duty of the officials to have availed them-

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selves thereof, and neglect to do this will not relieve the town of liability.

Defendant's second assignment of error is to the point that the court erred in overruling its demurrer to the plaintiff's evidence. The basis of this complaint is that the evidence shows that plaintiff had no cause of action against the defendant; second, that the evidence showed plaintiff guilty of contributory negligence; and third, that the evidence fails to show any notice to the officers and agents of the defendant of the dangerous or imperfect condition in the walk or step at the place complained of. On the first and second of these propositions we will say that we have carefully read not only the testimony set forth in the briefs of the respective parties, but also the record, and entertain no doubt whatever upon the sufficiency of the proof to show not only plaintiff's injuries and her right of action, but that, in using the crossing and the step in question at this much frequented corner on these streets, she was in no wise guilty of contributory negligence. The evidence shows that the accident occurred on a cloudy night with no lights except those which shone from the business houses and which were not sufficient to disclose the dangerous condition of the step.

The rule in such a case is stated in the case of *City of Stillwater v. Swisher*, 16 Okla. 585, 85 Pac. 1110, as follows:

"A person traveling on a public street of a city, which is in constant use by the public, while using the same with reasonable care and caution, has a right to presume that such street is in reasonably safe condition and is reasonably safe for ordinary travel by night, as well as by day, throughout its entire width and is free from all dangerous holes and obstructions."

And also in *City of Oklahoma City v. Reed*, 17 Okla. 518, 87 Pac. 645, that:

"In an action against a municipal corporation for personal injuries, there is no presumption that the plaintiff or defendant is guilty of negligence, and, in order to entitle the plaintiff to recover, it is sufficient for him to show that the defendant was guilty of negligence, with nothing in the circumstances establishing contributory negligence on his part; and, when such facts are proven, it devolves upon the defendant to prove affirmatively that the plaintiff was guilty of contributory negligence."

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Nor was it essential that actual notice be brought home to the officers of the village. The evidence showed that the step had been in the condition which caused plaintiff's injuries during all of the time of the incorporation of the town, and probably for some time prior thereto. Its public location was such that a jury had a right to assume that the officers either did or should have had notice thereof; the rule being as laid down in the case of *Town of Norman v. Teel*, 12 Okla. 69, 69 Pac. 791, that:

"The sufficiency of notice to fasten liability upon a city for a defective sidewalk is a question of fact to be determined by a jury under all the circumstances surrounding the particular case. It is not essential that the corporation shall have actual notice. If the defective condition of the street or sidewalk has existed for such a period of time that, by the exercise of ordinary care and diligence, the city authorities could have repaired the defect and placed the street or sidewalk in a reasonably safe condition, and it fails to do so, then it is liable for any injuries that may be occasioned thereby by reason of such negligence, provided the injured party was in the exercise of ordinary care."

See, also, *City of Guthrie v. Finch*, 13 Okla. 496, 75 Pac. 288.

The fourth assignment of error raises a question on which the evidence is conflicting, the condition of the step. That of the plaintiff supports the verdict, and that of certain witnesses for the defendant disputes the facts upon which plaintiff relies. Under these circumstances the affirmative evidence being sufficient to support the verdict, the same will prevail, as the issue thereon was determined by the verdict. The court denied to defendant the right to establish the custom of the First National Bank of maintaining its light at the corner where this accident occurred. In this action, in our judgment, no error was committed.

It is contended that the verdict was the result of passion and prejudice, and that the amount of recovery allowed plaintiff was excessive. In this we are not able to concur. The facts disclose that plaintiff was a widow, 42 years of age, and was teaching music for a livelihood. Prior to her injuries she earned not less than from \$12 to \$15 per week, and for five or six months thereafter was totally unable to earn any money at all, and since had not been able to earn more than \$4 or \$5 per week. That she had contracted and was required to pay heavy doctor bills,

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and her injuries consisted of the breaking of both bones of one of her lower limbs just above the ankle; that the other was badly sprained, and she was badly bruised as a result of the fall and suffered intensely for several months, her suffering continuing to the time of the trial. The evidence showed that the injuries were permanent and that she would probably be a cripple for life. Under these circumstances, in our judgment a verdict for \$2,000 was not excessive, nor is there any evidence to show that the same was the result of prejudice or passion.

The instructions given by the court were not excepted to by the defendant, and, viewing the entire record and conclusion of the trial, we are not able to say that substantial justice was not reached in the verdict.

The order of the trial court denying a motion for a new trial is accordingly affirmed.

All the Justices concur.

CLEMENS v. ST. LOUIS & S. F. R. CO.

No. 1765. Opinion Filed March 15, 1913.

(131 Pac. 169.)

1. **NEGLIGENCE—Pleading—Contributory Negligence—Admissions.** In an action for personal injuries, where defendant denies generally, and alleges contributory negligence, the latter allegation is not an implied admission of negligence, rendering proof of negligence unnecessary, and limiting the issues to that of contributory negligence.
2. **MASTER AND SERVANT—Injuries to Servant—Evidence.** Where, in a suit for personal injuries sustained in a collision by plaintiff's intestate while an engineer on defendant's train, deceased was under orders to run from C. to L., which he did, and while running, under slow speed on the main track to the station at L. collided, in a dense fog, with a switch engine making up another train due to leave an hour and a half before, held, the pleadings raising the issue, that it was error for the court to exclude testimony offered to prove a custom, in effect, that the rule requiring deceased to take the side track under said order had been abandoned by being habitually disobeyed and disregarded by him with knowledge of the defendant.
(Syllabus by the Court.)

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*Error from District Court, Oklahoma County;
S. H. Russell, Assigned Judge.*

Action by Elizabeth Clemens against the St. Louis & San Francisco Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

W. L. McCann and A. T. Earley, for plaintiff in error.

W. F. Evans and R. A. Kleinschmidt, for defendant in error.

TURNER, C. J. This is an action in damages for personal injuries, brought by plaintiff in error, as the widow of James W. Clemens, against the defendant in error in the district court of Oklahoma county.

The petition substantially states that on January 14, 1907, deceased, while in the employ of defendant as an engineer on extra No. 340, started with his train, consisting of an engine and eleven cars, from Cache to Ft. Sill, by way of Lawton, where the same was due to arrive each day at 8:30 a. m., and where it was customary and in conformity to defendant's orders to approach the station on the main line, for the purpose of receiving orders to proceed; that on said morning a train, known as local No. 475, was making up at Lawton to go west through Cache to Quanah, Tex.; that when said extra No. 340 arrived at the west switch at the head of the passing track at Lawton it was defendant's duty to have the main track clear; that it failed so to do, but negligently permitted train No. 475 to operate on the main line between said switch and the station without notice to train No. 340, and as a result, while approaching under full control said station on said day, the engine attached to said extra No. 340 was struck by the engine of No. 475, which, owing to a dense fog, deceased could not see in time to avert a collision, and he was thrown from his cab and fatally injured.

For answer, after a general denial, defendant alleged that deceased was guilty of contributory negligence, in that it was his duty, as a matter of reasonable precaution, and according, not only to the custom, but the rules and regulations of the company then in force, to approach the yards and terminals at that place

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cautiously, with his engine under full control, and to look out for other trains in the yards as he approached with his train, and not to proceed beyond the junction of the passing track until so ordered, but to side-track his train thereon; all of which, it is alleged, he did not do, but approached with his engine not under full control, and did not take the side track, but went down the main track without orders so to do, and without keeping the proper lookout, in consequence of which the collision occurred. The answer specifically denies that deceased was obeying the orders, rules, and regulations of the company at the time of the injury, but charges that the same was occasioned by his disobedience to an order, which reads:

Form 31, St. Louis & San Francisco Railroad Company.

Train Order No. 21.

Cache, Jan. 14, 1907.

To C. & E. Eng. 340 at Cache Station.

X-----Opr.-----M.

Order No. 8 is annulled.

Engine 340, Barkalow, will run extra,

Cache to Lawton, with right over No. 475.

[Signed] J. H. J.

Conductor and Engineer must both have copy of this order.

Repeated at 7:41 a. m.

Conductor: Barkalow. Train: Ex. 340. Made: Complete.

Time: 7.41. Opr.: A. M. Booker.

—and which, under the rules of the company, it says, meant that No. 340 was required to run as an extra from Cache to Lawton prior to the departure of train No. 475, and that, said No. 340 being inferior in class to the former, and its engine having the right to switch anywhere in the yards, it was the duty of deceased to side-track his train on the passing track and keep out of way of trains in the yards, and that the right of way of train No. 340 expired under said order when said passing track was reached. Defendant filed copy of said rules, regulations, and order, and alleged that the same were or could have been known to deceased by the exercise of due care, and asked to be discharged, with its cost.

For reply, after a general denial, plaintiff specifically denied the existence of any custom, rule, or regulation, in force at the time of the injury, requiring deceased to approach the yards or terminals of defendant at Lawton cautiously and with his engine

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under control, but averred that he did so. Plaintiff further denied the existence of any custom, rule, or regulation requiring deceased to look out for trains in the yard at that point as he approached with his train, but averred that he did so, but on account of the fog could not see the colliding engine in time to avoid the injury. Plaintiff further denied the existence of any custom, rule, or regulation making it the duty of deceased not to proceed beyond the junction of the passing track until so ordered, but to side-track his train on the passing track, and averred that if defendant had any such custom, rule, or regulation it permitted the same to be, and the same had been, abandoned by being for a long time prior thereto habitually disobeyed and disregarded, with the full knowledge of defendant. Plaintiff further averred that by authority of the orders of defendant, and in keeping with its reasonable rules and regulations in force at the time, deceased had the right to proceed as he did on the main line to the depot at Lawton, and that such had been the custom for a long time, with defendant's knowledge.

At the close of the testimony there was judgment rendered and entered for defendant pursuant to a verdict directed by the court, on the ground that no negligence was shown, and plaintiff brings the case here.

Plaintiff assigns this for error, because, she says, the plea of contributory negligence was an admission of negligence by defendant. Not so. Such a plea following a general denial in a preceding paragraph, as here, is not, under our Code, such an admission. 29 Cyc. 582; 5 En. Pl. & Pr. 11 and 12. 6 Current Law, 768, 769, says:

"While a denial of negligence and an allegation of contributory negligence are verbally inconsistent, they are not so in practice, and a defendant need not elect between the two defenses; nor does the plea of contributory negligence, when properly pleaded, admit the negligence as charged in the petition."

In *Geo. Fowler, etc., v. Brooks*, 70 Pac. 600, the syllabus says:

"In an action for personal injuries, where defendant denies generally, and alleges contributory negligence, the latter allegation is not an implied admission of negligence, rendering proof of negligence unnecessary, and limiting the issues to that of contributory negligence."

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The undisputed testimony discloses that the run of No. 340 was made from Cache to Lawton under the order set forth in defendant's answer; that under the rules of the company introduced in evidence it meant that No. 340 was required to run as an extra, with right of way on the main track from Cache to Lawton before No. 475 left that point, and there take the passing track and keep out of the way of No. 475; that said order and rules were disobeyed by deceased, who, after whistling at the whistling post for town, upon reaching the passing track, sought to continue down the main track up to the station at a speed of about six miles an hour, when the collision occurred in a fog so thick that engine No. 475 could not be seen in time to avert the accident. The testimony further discloses that No. 340 was an extra train loaded with ballast, and that it had been running under special orders for several days between those points. To avoid the force of this testimony, in effect, that the injury occurred as a result of deceased's violation of said order and the rules of the company, plaintiff, pursuant to her plea, offered to prove that the rule requiring No. 340 to take the passing track at Lawton had, with the knowledge of defendant, been so habitually violated by deceased as to amount to its abrogation, and that it was customary for him to do as he did on this occasion, which was to continue on the main track up to the station and there receive his orders. To this offer the court said:

"I am not going to let any custom in, even if this witness knows it, that would control this case or the admissibility of the evidence, in view of the order that has been proved and admitted to be in force."

Therein the court erred, for the reason that evidence tending to prove that the rule relied on has been nullified and abandoned by being constantly violated, with the knowledge of the master, is admissible. 8 Am. & Eng. Ann. Cases, note, pp. 15, 16, and 17, and cases cited. If such were true, it was negligence on the part of defendant to dispatch this extra train to Lawton without notifying train No. 475, switching in the yards at that point, of its approach, in order that it might keep out of the way, or without notifying No. 340 that train No. 475, scheduled to leave at 7

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a. m., or an hour and a half before the accident, had not yet left the yards.

In *McGraw v. T. P., etc., R. R.*, 50 La. Ann. 466, 23 South. 461, 69 Am. St. Rep. 450, it is said:

"It is negligence to omit to notify the employees who are dispatching an extra freight train by night that the track is obstructed at a yard which the train will reach within an hour after starting, and also negligence to omit to notify those in charge of the yard that the train is coming."

See, also, 1 Labatt, 487; *Sheehan v. N. Y., etc., Ry. Co.*, 91 N. Y. 332.

The judgment of the trial court is reversed.

All the Justices concur.

 MIDLAND VALLEY R. CO. v. STATE *et al.*

No. 3709. Opinion Filed January 28, 1913.

Rehearing Denied March 19, 1913.

(130 Pac. 803.)

CARRIERS—Live Stock Shippers—Dipping of Cattle—Compensation—

"Public Service." The dipping of cattle in its vats by a railroad company engaged in transporting cattle over its line from points below the quarantine line, to points above the quarantine line, before the same were turned loose in pastures, when such dipping was pursuant to quarantine regulations prescribed by law, is so cognate to and involved in the carriage and delivery of such cattle by the railroad company to patrons along its line as to constitute a part of its public service.

(a) This service is a public service, within the meaning of the Constitution of this state, and is subject to the superintending power of the state.

(b) The Corporation Commission has the power, under section 18, art. 9, of the Constitution (section 234, Williams' Ann. Const. Okla.), to fix a reasonable charge to be paid by the patrons to the railroad for such service.

(Syllabus by the Court.)

Appeal from the State Corporation Commission.

Proceeding by the State and others against the Midland Valley Railroad Company. From the judgment, the railroad appeals. Affirmed.

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Edgar A. de Meules and Sol H. Kauffman, for appellant.

Chas. West, Atty. Gen., and *Chas. L. Moore*, Asst. Atty. Gen., for appellees.

WILLIAMS, J. This appeal seeks to review Order No. 563, made by the Corporation Commission, wherein it was "ordered that the defendant, the Midland Valley Railroad Company, so long as it engages in the dipping of cattle within the state of Oklahoma, shall for the first dipping charge not exceeding fifteen cents per head; all subsequent dippings not to exceed ten cents per head." Appellant insists that the Corporation Commission was without jurisdiction to make this order.

Section 18, art. 9, of the Constitution, was borrowed from Virginia. See note to section 234, Williams' Ann. Const. Okla. In *Norfolk & Portsmouth Belt Line R. Co. v. Commonwealth*, 103 Va. 289, 49 S. E. 39, it is said:

"If the power of the commission is limited merely to fixing the rate for carriage, and it is without authority so to regulate that service as to render it ineffective, it is obviously wholly inefficacious with respect to this large class of consignees and shippers."

In that case the order of the State Corporation Commission of Virginia, fixing the charge of placing cars in position to be weighed on consignees' or shippers' individual track scales, located on private sidings leading to industries along the line of appellant's railroad, at 25 cents per car for each car, loaded or empty, so placed in position and weighed, was assailed on the ground that said commission had no authority to fix the charge. The court held that the commission had authority to regulate the same.

Cattle transported by the appellant from certain points within the state below the quarantine line, but delivered and turned loose at points within the state above the quarantine line, are required to be dipped pursuant to certain quarantine regulations prescribed by law. It is the custom for the appellant to provide for this dipping prior to said cattle being turned loose at such points of delivery above the quarantine line, and the furnishing of the facilities for the dipping of such cattle by said appellant, therefore, by custom, comes within its duty as a common

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carrier; and the order made by the commission is appealable and reviewable in this court. Section 234, Williams' Ann. Const. Okla.; *Norfolk & Portsmouth Belt Line R. Co. v. Commonwealth*, *supra*.

The evidence discloses that prior to the making of this order by the commission appellant had been charging 25 cents for the first and fifteen cents for the second dipping, and that its dipping an animal costs less than two cents.

The order of the commission is, in part, as follows:

"The commission finds that the defendant delivers to the Osage Nation approximately 75,000 head of cattle annually, which must be dipped before the owners thereof can permit them to run at large in the pastures north of the quarantine line. It appears, by request of the shippers, the railroad company established vats and draining pens adjoining their regular unloading or shipping pens, and by this means cattle could be dipped when they were unloaded and delivered to the shipper at less expense and inconvenience to the shipper than to be driven off of the railroad right of way and dipped at private vats, and, in fact, private vats were not available at all places where cattle were desired to be unloaded.

"The evidence also shows that the defendant charges twenty-five cents for the first dipping and fifteen cents for the second, and where cattle are dipped the third time it charges ten cents. The general manager of the defendant was requested to make a complete tabulated statement, which was by agreement to be incorporated into the record, which is as follows:

"Statement of Cattle Dipped by Midland Valley Railroad and the Estimated Cost of Dipping, Year Ending June 30th, 1911.

| Cattle Dipped. | | |
|---|-----------|-------------|
| | Number of | |
| | Head. | |
| First dip | 76,794 | \$19,199.40 |
| Second dip | 20,275 | 3,041.25 |
| Third dip, total..... | 91,548 | 31,544.80 |
| Cost of Dipping. | | |
| Cost of material and labor charged to dipping vats and dipping cattle | | \$ 2,406.07 |
| 10% labor added account supervision..... | | 240.60 |
| 10% labor and account delays to trainmen vats..... | | 240.60 |
| Total material, labor and repairs..... | | \$ 2,887.23 |
| Value of Dipping Plants. | | |
| Nelogany | | \$ 2,040.49 |
| Big Heart | | 836.00 |

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| | |
|-----------------|----------|
| Skiatook | 990.31 |
| Blackland | 1,187.94 |
| Myers | 1,825.00 |

| | |
|---------------------------|-------------|
| Total cost | \$ 6,879.74 |
| Depreciation at 20% | 1,375.95 |
| Interest at 6% | 412.78 |

| | |
|------------------|-------------|
| Total cost | \$ 4,676.01 |
|------------------|-------------|

“Average cost per head, \$.0474.

“Accounting Department July 19, 1911.

“Correct: F. N. Niles, Asst. Auditor. E. M. Alford, V. P. & G. M.’

“It appears from the evidence in this case that cattle are delivered to the shipper, and, as a matter of convenience, dipping vats have been established by the defendant adjoining its stock pens operated by the railroad company, for which it makes special charges as above set forth.

“If this is a part of common carrier’s duties, it can have two objects in performing the service: One to encourage cattle feeders to ship cattle over its lines; and, second, for the profit it derives from the dipping thereof. * * *

“Considering that at times there may not be more than two or three car loads to dip, and the necessity of preparing the dipping vat with the solution for small or large amounts, we are of the opinion that fifteen cents per head for the first dipping and ten cents for each additional dipping is sufficient remuneration to be charged, and will yield sufficient profit to pay all expenses and rebuild the vats new annually. * * *

Appellant insists that the order was entered by the commission on the theory that section 8812 of Comp. Laws 1909 applied, and not pursuant to the grant of authority by section 18 of article 9 of the Constitution; and therefore the appellees are bound by that theory, and on that alone may this court sustain the same. That rule has no application in this case.

In *Oklahoma Ry. Co. v. St. Joseph’s Parochial School*, 33 Okla. 755, 127 Pac. 1087, it is said:

“An order, on appeal, will not be vacated if the record shows proper ground to sustain same, though the commission, in entering same, gives a ground therefor not tenable under the law. *Hancock v. Youree et al.*, 25 Okla. 460, 106 Pac. 841.”

Appellant insists that it did not have ten days’ notice of the time and place, as contemplated by section 234, subd. 3, of Williams’ Ann. Const. The record recites that:

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"Said complaint having been duly served upon said defendant railroad company, said cause was set down for hearing in the office of the commission at Oklahoma City on the 14th day of June, 1911. And at said date, said cause coming on for hearing before the commission, the following proceedings were had and testimony introduced therein as follows. * * *"

No objection to any defect in said notice having been interposed, but the defendant having appeared and participated in said hearing by cross-examining the witnesses, the appellant waived such notice. The record recites:

"Mr. de Meules: This case was set for hearing on the first day of the last term, at which time we appeared. The complainants not appearing, the commission entered an order continuing the case; whereupon the witnesses for the railroad departed, and it was opened the next day. The complainants appeared from some misunderstanding, and at that time the commission took the testimony of the complainants in the absence of the railroad company. We have a transcript of the evidence, and we would suggest to the commission that the state of evidence is such that we feel that it is only proper that we should be allowed to cross-examine these witnesses. We are here, however, to make what statement we can with reference to the matter now, and would ask at some convenient time that the witnesses be required to appear, so we may cross-examine on some matters. Commissioner Henshaw: Let me see a copy of that testimony. This is in reference to dipping cattle. I remember the case now. The testimony of the witnesses here, as I understand it, is largely a statement of facts, and we can get witnesses today from the agricultural department that know the same as these do, and in that way we can disregard any of the disputed parts of this testimony. I don't care to delay this case longer than this term, if possible, for the purpose of cross-examining these particular witnesses; but if there is any part of this evidence that you desire to contest, why you can do so, and we will either recall these witnesses, or we will call some other witness from the agricultural department. Proceed with your evidence in the case."

Mr. E. M. Alford, the vice president and general manager of the Midland Valley Railroad Company, was then introduced by appellant, and testified in its behalf.

Nowhere in the record was any objection made on account of any defect in the notice; nor was any continuance asked. There is no merit in this contention. *Hine v. Wadlington et al.*, 27 Okla.

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285, 111 Pac. 543; *St. Louis & S. F. R. Co. v. Williams et al.*, 25 Okla. 662, 107 Pac. 428.

The order of the commission is affirmed.

All the Justices concur.

BEATY v. STATE *ex rel.* LEE.

No. 4718. Opinion Filed March 25, 1913.

(130 Pac. 956.)

1. **CLERKS OF COURTS**—"County Office." The office of clerk of the superior court is a county office.
2. **SAME—Term of Office—Repeal of Statute.** Section 8 of the Act of March 6, 1909 (sections 1965-1976, Comp. Laws 1909; chapter 14, art. 7, Sess. Laws. 1909), in so far as it affects the term of the clerk of the superior court, is repealed by section 19 of the Act of March 19, 1910 (chapter 69, Sess. Laws 1910 [Ex. Sess.] pp. 129, 143).
3. **SAME—Election.** The laws in force in this state at the time of the holding of the election for county officers in November, 1912, provided for the election of the clerk of the superior court.
(Syllabus by the Court.)

Error from District Court, Oklahoma County;
Geo. W. Clark, Judge.

Action by the State of Oklahoma, on the relation of Harold Lee, against James Beaty. Judgment for plaintiff, and defendant brings error. Affirmed.

Flynn, Chambers, Lowe & Richardson, Harris & Nowlin,
and *Wm. H. Zwick*, for plaintiff in error.

G. A. Paul and *Giddings & Giddings*, for defendant in error.

WILLIAMS, J. The following questions are presented for our consideration:

- (1) Is the office of the clerk of the superior court a county office?
- (2) Was section 8 of the Act of March 6, 1909, creating and establishing a county superior court for each county of the

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state having a population of 30,000 and a city therein of 8,000, and fixing the jurisdiction of said courts, for fixing the procedure, providing for judges of said courts, for the election, appointment, term of office, and compensation of said judges, providing for a clerk and stenographer, fixing compensation of the same, and declaring an emergency (chapter 24, art. 4, Comp. Laws 1909; chapter 14, art. 7, Sess. Laws 1909), in so far as it fixes the term of the clerk of the superior court, repealed by section 19 of the Act of March 19, 1910 (chapter 69, Sess. Laws, pp. 129, 143), entitled "An act relating to certain county and district officers"?

(3) Did the law provide for the election of a clerk of the superior court at the general election held in November, 1912?

1. Section 8 of the Act of March 6, 1909, creating superior courts (section 1972, Comp. Laws 1909), provides:

"The judge of each of said courts shall appoint a clerk who shall serve until the second Monday in January, 1911, or until his successor is elected and qualified; and such clerk shall be elected at every similar election every fourth year thereafter. The duties of such clerk shall be the same relative to the said court as are provided for the clerk of the district court, and he shall give bond for the faithful performance of his duties as required of the clerk of the district court. The clerk of said court under and by direction of the judge thereof shall procure a seal for said court, which shall have engraved thereon the words 'Superior Court of _____ County, Oklahoma,' (naming county) and said clerk shall receive the same fees and be paid in the same manner as provided for the clerk of the district court."

By this section it is intended that the clerk of said court was to be elected at the general election for county officers to be held in 1910. The Act of March 19, 1910 (chapter 69, Sess. Laws 1910, pp. 129, 143), relates to certain *county* and *district* officers. Section 1 prescribes the fees to be charged by the clerk of the superior, county, and district courts; sections 2, 3, 4, 5, and 6, respectively, the fees to be charged by the county judge, register of deeds, county clerk, county treasurer, and sheriff. Section 7 of said act provides that the county shall in no case be responsible for any fees, salaries, or expenses for any county or subdivision officer, unless expressly allowed by law. Section 9 also provides that at each monthly meeting of the board of county commission-

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ers the clerk of the district court, the clerk of the superior court, the clerk of the county court, the county clerk, and the register of deeds shall each file a verified report of the work of the preceding month showing the total fees charged in each case, and the total fees collected in each case, and shall pay all of such fees into the county treasury, and file duplicate receipts therefor with the county clerk. Section 10 provides for the rendering of an itemized and verified report of the work of the sheriff for the preceding month, etc. Section 11 permits the county commissioners in their discretion to allow a jailer. Section 12 relates to the appointment of deputy sheriffs. Section 13 prescribes the fees to be taxed and collected in all criminal cases to be known as county attorney's fees, which shall be paid into the county treasury. Section 28 fixes the salary of the judge of the superior court; section 29 the salary of the county judge and county attorney; section 30 that of the clerk of the district court, superior courts, county clerk, county treasurer, and register of deeds. Section 36 prescribes the fees to be charged by justices of the peace, and section 38 the fees to be charged by notaries and section 39 that for bailiffs. The superior court, though its jurisdiction is confined to the limits of the county, is a part of the judicial department of the state, with practically the same functions as those of the district court, and the judge of said court has for that reason been held not to be a county officer. *Chickasha Cotton Oil Co. v. Lamb & Tyner*, 28 Okla. 275, 114 Pac. 333; *State ex rel. West, Atty. Gen., v. Breckinridge*, 34 Okla. 649, 126 Pac. 806.

Jefferson v. Toomer, 28 Okla. 658, 115 Pac. 793, was disposed of on the assumption that the clerk of the superior court was a county officer, as counsel for all parties in their briefs so treated it. The fact that the act creating superior courts provided for the judges of said courts to be elected at the time the county officers are elected did not of itself have the effect of making such office a county office, especially in view of the character of such office. The clerk of the district court, a court of equal rank, was specifically made by law a county officer. Said clerk and the clerk of the superior court in said Act of March 19, 1910, are treated on a parity and in the same manner by the Legislature. It

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is obvious that the Legislature has not only treated the clerk of the superior court as a county officer, but intended that it should be such. There being nothing in the character of his position that would overcome such legislative intention manifested by the history of this legislation, we conclude that the clerk of the superior court is a county officer.

Section 19 of the Act of March 19, 1910, provides that:

"All county, township and district officers elected at the general election in the year 1910 enter upon the duties of their office on the second Monday in January, 1911, and shall hold until the first Monday in January, 1913, and until their successors are elected and qualified; and thereafter the terms of all such officers shall be for two years and until their successors are elected and qualified. Provided, that the county treasurer and superintendent of public instruction shall hold office until the first Monday in July, 1913, and thereafter their terms of office shall be for two years, and until their successors are elected and qualified."

The terms of all county and township officers, including those elected at the time of the adoption of the Constitution, as well as those appointed under the provision of the laws extended in force in the state at the time of its erection, expired on the second Monday in January, 1911, and thereafter the terms of county officers and township officers were to be as provided by the laws of the territory of Oklahoma for like named officers, except as otherwise provided in the Constitution. Section 18, Schedule to the Constitution; section 382, Williams' Ann. Const. Okla. By section 2, art. 17, of the Constitution (section 320a, Williams' Ann. Const. Okla.), there was created, subject to change by the Legislature, in and for each organized county of this state, the offices of the judge of the county court, county attorney, clerk of the district court, county clerk, sheriff, county treasurer, register of deeds, county surveyor, superintendent of public instruction, three county commissioners, and such municipal township officers as were then provided for under the laws of the territory of Oklahoma, except as otherwise provided in the Constitution. Under the territory of Oklahoma each district court appointed its clerk, who held office subject to the pleasure of the court. Organic Act May 2, 1890; section 9, St. Okla. 1893, p. 43; 26 Stat. 81. c. 182. The term for the district clerk, after the expiration of the

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term of such clerk elected at the time of the ratification of the Constitution, which expired on the second Monday in January, 1911, had not been fixed by law prior to the time of the passage of the Act March 19, 1910, relative to certain *county* and *district* officers. By section 19 of this act the terms of all county, township, and district officers were ultimately to be two years. The county treasurer and superintendent of public instruction were to hold until the first Monday in July, 1913. This provision was inserted evidently with a view that their terms might expire with the fiscal year, after which time their offices would regularly be for the term of two years. When there are two acts, one relating generally to a subject and another to a special part or class of such subject, unless they are absolutely irreconcilable, effect should be given, if possible, to both. This is a general rule of construction. *Kuchler v. Weaver*, 23 Okla. 420, 109 Pac. 915, 18 Ann. Cas. 462.

In *Trapp v. Wells Fargo Express Co.*, 22 Okla. 377, 97 Pac. 1003, it is said:

“Statutes may not be revoked or altered by construction when the words may have their proper operation without it, but, in the nature of things, contradictions cannot stand together; and where there is an act or provision which is general and applicable, actual or potential, to a multitude of subjects, and there is also another act or provision which is particular and applicable to one of these subjects, and inconsistent with the general act, they are not necessarily so inconsistent that both cannot stand, though contained in the same act, or though the general law were an independent enactment. The general act would operate, according to its terms, on all the subjects embraced therein, except the particular one which is the subject of the special act, which would be deemed an exception, unless the terms of the latter, which were general, manifestly intended to exclude the exception.”

See, also, to the same effect *McKeever v. Colvin*, 31 Okla. 715, 123 Pac. 156; *Incorporated Town of Valiant v. Mills et al.*, 28 Okla. 811, 116 Pac. 190; *Showers v. Caddo County*, 14 Okla. 157, 77 Pac. 189; *McMillan v. Board of County Commissioners*, 14 Okla. 659, 79 Pac. 898; *Carpenter v. Russell*, 13 Okla. 277, 73 Pac. 930; *A., T. & S. F. Ry. Co. et al. v. Haynes*, 8 Okla.

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576, 58 Pac. 738; *Goodson v. United States*, 7 Okla. 117, 54 Pac. 423.

In *Maben v. Rosser et al.*, 24 Okla. 588, 103 Pac. 674, recognizing the foregoing rule of construction, it is said:

"It is true that this rule of construction must yield to that other and always superior canon of construction which declares that, in construing a statute, the primary object shall be the intention of the lawmakers, and, when any rule of construction defeats that intention, it must be abandoned. Rules of construction are but aids to the accomplishment of this primary object."

Where the meaning intended by the use of a certain word or phrases of certain words in a statute is uncertain, the intention will be ascertained by consideration of the entire statute and other statutes concerning the subject-matter and the history and surrounding conditions at the time of its enactment. *Rakowski v. Wagoner*, 24 Okla. 282, 103 Pac. 632; *Trapp v. Wells Fargo Express Co.*, 22 Okla. 377, 97 Pac. 1003; *Winslow v. France*, 20 Okla. 303, 94 Pac. 689; *Territory of Oklahoma ex rel. Sampson v. Clark*, 2 Okla. 82, 35 Pac. 882.

Construing the act in the light of its title, to wit, "An act relating to certain county and district officers," clerks of the district, superior, and county courts, county judges, registers of deeds, county stenographers, county attorneys, assistant county attorneys, judges of the superior courts, county commissioners, county superintendents of public instruction, justices of the peace, court bailiffs, and notaries, and the history of this legislation, we conclude that as the term is used in the title of said act the clerk of the superior court is a county officer and the judge of said court a district officer.

Section 5 of the Act of March 6, 1909 (chapter 14, art. 7, p. 182; section 1969, Comp. Laws 1909), is as follows:

"At the general election of county officers to be held in the year 1910, and at every similar election every fourth year thereafter, the qualified electors of such county wherein a superior court has been established, as provided in this act, shall elect a judge of said court for such county to serve from the second Monday of the following January until the second Monday of January four years thereafter and until his successor shall be elected and qualified."

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The Third Legislature evidently construed section 19, c. 69, Session Laws of the Extraordinary Session 1910, p. 137, as by implication repealing said section 5, and fixing the term of the judges of the superior courts at two years, for on March 16, 1911, it enacted that:

“At the general election of county officers to be held in the year 1914, and at every similar election every fourth year thereafter, the qualified electors of all counties wherein a superior court has been established shall select a judge of said court for such county to serve from the first Monday of the following January until the first Monday in January, four years thereafter, and until his successor shall be elected and qualified.” (Section 1, c. 94, Sess. Laws 1911, p. 206.)

Section 2 of said act also provides:

“All acts and parts of acts in conflict herewith and all acts and parts of acts providing for the election of judges of the superior courts at the general election to be held in the year 1912 are hereby repealed.”

In *Tiger v. Western Investment Co.*, 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738, the rule of construction is announced that subsequent congressional legislation may be considered as an aid to the interpretation of prior legislation upon the same subject. The acts of Congress under consideration in the Tiger case were passed by different Congresses. It may be urged that the Act of March 16, 1911, providing for the election of the judges of the superior courts, the first election to be held in 1914 and every four years thereafter, repealing section 16 of the Act of March 19, 1910, as far as it affected the judges of the superior courts, would have the effect of extending the term of office of such judges as were elected at the state election in 1910 for an additional period of two years. Such is not the case, for, if that had been intended by the Legislature, said act would be repugnant to section 10, art. 23, of the Constitution. It is a well-settled rule of construction that where an act is susceptible of two constructions, one of which would render it valid and the other invalid, that must be adopted which sustains the act. 2 Lewis' Sutherland Statutory Const. (2d Ed.) sec. 498, p. 927.

The Act of March 6, 1909 (chapter 14, art. 7, p. 182, Sess. Laws 1909; section 1969, Comp. Laws 1909), provides that such

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judge as may be elected in the year 1910 shall serve " * * * until his successor shall be elected and qualified." It is suggested that, as said provision does not provide that he shall serve until his successor is elected or appointed and qualified, therefore, no vacancy has occurred which can be filled by the Governor under section 13, art. 6 (section 162, Williams' Ann. Const. Okla.), of the Constitution of this state. That question is not essential here to be determined in order to dispose of this case and no opinion is, therefore, expressed thereon. The entire act or statute is to be examined with a view of arriving at the true intention of each part, and effect, if reasonably possible, is to be given to the whole act, and to every section or clause. If different portions seem to conflict, courts must harmonize them, if practicable, favoring that construction which will render every word operative, rather than one which makes some words idle and nugatory. *Trapp v. Wells Fargo Express Co., supra; Territory v. Clark, supra.*

Following this rule of construction the foregoing conclusions give effect to the entire Act of March 19, 1910, and bring about harmony in the tenure of offices of like kind in the state, to wit, judges of the superior courts and district courts to hold for four years and all county and township officers to hold for a period of two years. In reaching this conclusion, we believe that we have unerringly carried out the intention of the Legislature.

It follows that the judgment of the trial court must be affirmed.

All the Justices concur.

JAMIESON v. STATE BOARD OF MEDICAL
EXAMINERS.

No. 4718. Opinion Filed March 25, 1913.

(130 Pac. 923.)

1. **PROHIBITION—Ministerial Functions.** A writ of prohibition will not lie to an executive or ministerial board to prohibit it from the performance of ministerial or executive functions.
2. **SAME—State Medical Examiners—Revocation of License.** The State Board of Medical Examiners in hearing charges filed before it pursuant to Comp. Laws 1909, secs. 4242-4264, for the purpose of having revoked a license theretofore issued by it to practice medicine and surgery in the state, on the ground that the same had been obtained through fraud, and also charging the certificate holder with unprofessional conduct, is engaged in the performance of a ministerial duty, and does not exercise judicial power, and a writ of prohibition thereto will not lie.

(Syllabus by the Court.)

Error from District Court, Logan County;
A. H. Huston, Judge.

Application by H. L. Jamieson for writ of prohibition against the State Board of Medical Examiners. Writ denied, and plaintiff brings error. Affirmed.

J. M. Springer, for plaintiff in error.

Chas. West, Atty. Gen., and *W. C. Reeves*, Asst. Atty. Gen., for defendant in error.

TURNER, J. On April 1, 1912, H. L. Jamieson, plaintiff in error, filed his petition in the district court of Logan county, and prayed for a writ of prohibition against the State Board of Medical Examiners of the state of Oklahoma and H. C. Manning, J. B. Murphy, and Alta McCarthy, prohibiting the board from proceeding to hear and determine certain charges set forth in a certain complaint filed by Manning and Murphy, president and secretary, respectively, of the board, the object of which was to have revoked the license of plaintiff, theretofore issued by the

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board, to practice medicine and surgery in the state, on the ground that the same had been obtained through fraud; also from proceeding to hear and determine the complaint of Alta McCarthy charging him with unprofessional conduct, with the same object in view.

From the judgment of the court upon the issues joined on the petition and the return to the writ, the trial court, in effect, held defendant to be an executive or ministerial board, to which the writ could not run, and plaintiff brings the case here. There was no error in this. The inquiry sought to be prohibited by the writ is in no sense the exercise of a judicial function by the board, and hence the writ cannot rightfully run against it. The act creating the board is found in Comp. Laws 1909, c. 64, and is entitled:

"An act to define and regulate the practice of medicine; to create a Board of Medical Examiners for the examination and licensing of physicians and surgeons, and to prescribe their qualifications; to provide for their proper regulation, and to provide for the revocation of their license; to require itinerant vendors to procure a county license and to fix suitable penalties for the violation of this act, and repealing laws and parts of laws in conflict herewith."

Section 1 of the act provides for the establishment of the board and for the filling of vacancies thereon. The next section prescribes the oath to be taken by each member of the board, and for its organization. The next three sections provide for the keeping of its records, its meetings, and its rules. The next, in effect, provides that every person before practicing medicine and surgery in the state, must have the credentials therein provided for; that, in order to procure them, he must produce satisfactory evidence of good moral character and a diploma issued by some legally chartered medical school or college, the requirements of which shall have been at the time of granting thereof in no particular less than those prescribed by certain colleges therein specified; or come up to another certain standard therein named. It also provides for the examination of the applicant, and makes certain other provisions. The next section provides that the board may at its discretion accept and register upon pay-

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ment of a fee, without examination of the applicant, the certificate issued to him by the board of another state. The next section provides for the grading of applicants, and that temporary permits may be granted until a certain time. The next section provides that a certificate shall issue to the applicant when he shows himself possessed of the qualifications therein required, and the next section for the recording of his certificate, and the next, for a medical register. The next section, among other things, provides, in effect, that when a holder of a certificate issued as therein provided shall be guilty of unprofessional conduct as therein defined, and the same is brought to the attention of the board granting said certificate, in the manner therein set forth, it shall be their duty to, and they must, at once revoke the same, and the holder of such certificate shall not thereafter be permitted to practice medicine and surgery in the state, but that no such revocation shall be made unless the holder is cited to appear, and the same proceedings are had as thereinbefore provided in case of refusal to issue certificate. Said procedure is, in effect, that citation is directed to issue to the holder of the certificate sought to be canceled by the board upon complaint filed before it and for the filing of a written answer under oath within twenty days after the service on him of the said citation. Upon the issues joined, a trial is directed to be had, and judgment rendered by the board for or against the revocation. The section then proceeds to define "unprofessional conduct," and states that the same is not intended to exclude other acts for which license may be revoked on the ground of unprofessional conduct.

Further recitation of the act is unnecessary. It is sufficient to say of said act that the same is of like effect to the act under construction in *State ex rel. v. Goodier et al.*, 195 Mo. 551, 93 S. W. 928, which was an application for a writ of prohibition against the State Board of Health to prohibit it from proceeding to hear a complaint for the revocation of a physician's certificate theretofore issued by the board as here. The writ was denied upon the ground that the same would not run to an executive or an administrative board. The court in passing said:

"The state board of health is not a court—is not a judicial tribunal. It can issue no writ. It can try no case—render no

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judgment. It is merely a governmental agency, exercising ministerial functions. It may investigate and satisfy itself from such sources of information as may be attainable as to the truth or falsity of charges of misconduct against one holding one of its certificates, but its investigation does not take on the form or character of a judicial trial."

And in the syllabus:

"Under Rev. St. 1899, sec. 8514, relative to the practice of medicine and surgery, declaring that the State Board of Health may refuse a license to practice medicine to any one guilty of unprofessional or dishonorable conduct, and may revoke licenses for like causes after giving the accused an opportunity to be heard in his defense before the board, the action of the board in revoking a license is not a judicial action and cannot be regulated by the writ of prohibition."

In *State ex rel. Elkin*, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037, the court said:

"A writ of prohibition is applicable whenever judicial functions are assumed which do not rightfully belong to the person or court assuming to exercise these functions."

And in *Higgins v. Talty*, 157 Mo. 280, 57 S. W. 724, where charges of keeping a disorderly house had been preferred against a dramshop keeper and Higgins, the excise commissioner, had cited him to show cause why his license should not be revoked, and where the dramshop keeper applied to the circuit court for a writ of prohibition against the commissioner to prohibit him from trying petitioner on the charges, because so to try him, he says, was an exercise of a judicial function which, under the Constitution, could be exercised only by a court, the Supreme Court of Missouri said:

"The proceeding was merely by way of investigation, and was in no sense a trial; that the excise commissioner, in proceeding to investigate the charges, 'was not acting judicially, but under the power conferred upon him by statute with respect to the subject-matter over which he has exclusive control'"—and denied the writ.

* Further citation of authority is unnecessary, as our own court has practically decided the question here involved in *State of Okla. ex rel. Caldwell v. Vaughn et al.*, 33 Okla. 384, 125 Pac. 899, members constituting the county election board of Cus-

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ter county. Caldwell brought suit in the superior court of Custer county for a writ of prohibition against the election board in that county to prohibit it from placing the names of proposed candidates upon the primary election ballot for the office of clerk of the superior court in that county, and from placing upon the general election ballots the name of any candidate or nominee for the same. Affirming the judgment of the trial court denying the writ, this court in the syllabus said:

"The writ of prohibition will not lie to an executive or ministerial board to control or regulate it in the performance of a ministerial or executive function. A county election board in placing upon the ballots for a primary election the names of candidates for nomination by the different political parties for the different officers to be elected by the county is engaged in the performance of a ministerial duty and does not exercise judicial power."

See, also, *Meffert v. Packer et al.*, 95 U. S. 625, 25 Sup. Ct. 790, 49 L. Ed. 350.

It is unnecessary to consider other questions raised in the briefs. The judgment of the trial court is affirmed.

All the Justices concur.

EBEY, Receiver, v. KRAUSE.

No. 2394. Opinion Filed March 11, 1913.

Rehearing Denied April 1, 1913.

(130 Pac. 1100.)

APPEAL AND ERROR—Defective Briefs—Affirmance. Affirmed on account of failure of plaintiff in error to comply with rule 25 of this court (20 Okla. xii, 95 Pac. viii).

(Syllabus by the Court.)

Error from District Court, Okfuskee County;
John Caruthers, Judge.

Action by W. H. Ebey, as receiver of the Citizens' Bank & Trust Company, against M. W. Krause. Judgment for defendant, and plaintiff brings error. Affirmed.

Ebey, Receiver, v. Krause.

Clinton A Galbraith, for plaintiff in error.

KANE, J. This was an action by the plaintiff below, as receiver of an insolvent bank, against the defendant, an incorporator and stockholder thereof, to enforce against him his statutory liability to the creditors and depositors of the bank growing out of that relation. As stated in the brief of counsel for plaintiff in error (there is no brief on behalf of defendant in error), the court below found that the defendant in error, while he had been an incorporator and original subscriber to the capital stock of the insolvent corporation, had sold out his stock and therefore relieved himself of liability, and decreed in his favor accordingly. As stated by counsel, the assignments of error relied upon "present but one question, and that is really the only question in this case, namely, Did the defendant in error relieve himself of the obligations he assumed by subscribing for the capital stock and becoming one of the incorporators, officers, and directors of the insolvent corporation by the action he claims to have taken?" It is obvious that in order to review that question it would be necessary to examine the record and the evidence upon which the court below based its conclusion.

Rule 25 of this court (20 Okla. xii, 95 Pac. viii) requires that the brief of the plaintiff in error "shall contain an abstract or abridgment of the transcript, setting forth the material parts of the pleadings, facts, and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of the questions presented to this court for decision, so that no examination of the record itself need be made in this court." And it further provides that:

"A party need not include in his abstract all the evidence in support of a claim on his part that it does not show or tend to show a certain fact, but when such a question is presented, the adverse party shall print so much of the evidence as he claims to have that effect."

The brief in the instant case is entirely wanting in all of the foregoing particulars. For failure to comply with the rule quoted, the court declines to review the assignments of error set out in the brief.

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The judgment of the court below is therefore affirmed.

HAYES, C. J., and TURNER, J., concur; WILLIAMS and DUNN, JJ., absent, and not participating.

ROBERTS v. MOSIER *et al.*

No. 2381. Opinion Filed April 1, 1913.

1. **NAMES—Right of Person to Change Name.** Although the custom is universal for all male persons to bear the name of their parents, there is nothing in the law prohibiting a man from taking another name, if he so desires; nor is there any penalty or punishment for so doing.
2. **SAME—Effect Upon Contracts.** A contract or obligation may be entered into by a person by any name he may choose to assume. The law only looks to the identity of the individual, and when that is clearly established the act, when free from fraud, will be binding.
3. **APPEAL AND ERROR—Findings of Court—Weight and Effect.** A cause having been tried to a court without a jury, a general finding by said court in favor of one of the parties will be given, upon appeal, the same weight and effect as the verdict of a jury.

(Syllabus by the Court.)

Error from District Court, Logan County;

A. H. Huston, Judge.

Action between Dora M. Roberts and Jacob Mosier, alias Fred Mosier, and others. From a judgment for Mosier, Roberts brings error. Affirmed.

Milton Brown, for plaintiff in error.

B. A. Mintonye, for defendant in error Mosier.

WILLIAMS, J. The question involved in the lower court was as to the priority of certain mortgages, to wit, the one in favor of defendant in error Jacob Mosier, alias Fred Mosier, or that of Dora M. Roberts, plaintiff in error; both mortgages having been executed by the defendants in error Verona Lyons and Sandy Lyons.

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It was contended by the plaintiff in error, who held the second mortgage, that hers should be declared prior to that of defendant in error Jacob Mosier, alias Fred Mosier, on the ground that the same was taken in favor of Fred Mosier in fraud of the revenue laws of the state, for the purpose of evading the payment of taxes justly due this state. *Shelton v. Pruessner*, 52 Kan. 579, 35 Pac. 201; *Hanover National Bank v. First National Bank*, 109 Fed. 421.

It was the contention of defendant in error Jacob Mosier, alias Fred Mosier, that the mortgage held at that time was taken in his name, to wit, Fred Mosier, he, at that time, adopting the name of Fred Mosier for the purpose of transacting his business thereunder.

There appears to be no statute in this state forbidding a man adopting a name for a business purpose. Section 2246, Comp. Laws 1909; section 2067, St. Okla. 1890.

In re John Snook, 2 Hilton's Reports (N. Y. C. P.), 566, it is said:

"As I have said, a man's name is the mark or *indicia* by which he is distinguished from other men. By a practice now almost universal among civilized nations, it is composed of his Christian or given name, and his surname. The one is the name given to him after birth, or at baptism; the other is the patronymic derived from the common name of his parents. In the case of illegitimates, they take the name or designation they have gained by reputation. *Rex v. Smith*, 6 C. & P. 154; *Rex v. Clark*, R. & R. C. C. 358. The Christian or first name is, in the law, denominated the proper name; and a party can have but one, for middle or added names are not regarded. *State v. Martin*, 10 Mis. 391; *Edmonston v. The State*, 17 Ala. 179; *McKay v. Spick*, 8 Tex. 376; *Rex v. Newman*, 1 Ld. Ray. 562, 305; *Franklin v. Tallmadge*, 5 Johns. R. 64. Formerly, the Christian name was the more important of the two. 'Specia. heed,' says Coke, 'is to be taken of the name of baptism, as a man cannot have two, though he may have divers surnames.' Coke Litt. 3, a. (m). Indeed, anciently in England, there was but one name, for surnames did not come into use until the middle of the fourteenth century, and even down to the time of Elizabeth, they were not considered of controlling importance. Thus Chief Justice Popham, in *Britton v. Wrightsman* (Poph. 56), speaking of grants, declares that 'the law is not precise in the case of surnames, but for the

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Christian name,' he says, 'this ought always to be perfect;' and throughout the early reports the Christian name is uniformly referred to as the most certain mark of the identity of the individual in all deeds or instruments. Greater importance being attached to the Christian name arose from the fact that it was the designation conferred by the religious rites of baptism, while the surname was frequently a chance appellation, assumed by the individual himself, or given to him by others, for some marked characteristic, such as his mental, moral or bodily qualities, some peculiarity or defect, or for some act he had done which attached to his descendants, while sometimes it did not. Camden mentions an instance of a knight in Cheshire, each of whose sons took different surnames, whilst their sons, in turn, also took different names from their fathers. They altered their names, he says, in respect to habitation, to Egerton, Cotgrove, and Overton; in respect to color, to Gough, which is red; in respect to learning, to Ken-Clarke (a knowing clerk or learned man); in respect to quality, to Goodman; in respect to stature, to Richard Little; and in respect to the Christian name of the father of one of them, to Richard son, though all were descended from William Belward; and the gentlemen of Cheshire, he adds, bearing those different family names, would not easily believe that they were all the descendants of one man, were it not for an ancient roll, which Camden saw. Camden's Remains (Ed. of 1637) p. 141. And Lord Coke refers to the Year Books to show that a man may have divers names, that is, surnames, at divers times. Coke Litt. 3, a. The insufficiency of the Christian name to distinguish the particular individual, where there were many bearing the same name, led necessarily to the giving of surnames; and a man was distinguished, in addition to his Christian name, in the great majority of cases, by the name of his estate, or the place where he was born, or where he dwelt, or from whence he had come, as in the name Washington, originally Wessyngton, which, as its component parts indicate, means a person dwelling on the meadow land, where creek runs in from the sea, or else from his calling, as John the smith, or William the tailor, in time abridged to John Smith and William Taylor. And as the son usually followed the pursuit of the father, the occupation became the family surname, or the son was distinguished from the father by calling his John's-son, or William's-son, which, among the Welsh, was abridged to s, as Edwards, Johns or Jones, or Peters, which, as familiar appellations, passed into surnames. The Normans added Fitz to the father's Christian name, to distinguish the son, as Fitz-herbert or Fitz-gerald. And among

the Celtic inhabitants of Ireland and Scotland, where each separate clan or tribe bore a surname, to denote from what stock each family was descended, Mac was added to distinguish the son, and O to distinguish the grandson; and generally, where names were taken from a place, the relation of the individual to that place was indicated by a word put before the name, like the Dutch Van or French De, or a termination added at the end, which additions were in time merged into and formed but one word, until, from these various prefixes and suffixes, numerous names were formed and became permanent. So, as suggested, something in the appearance, character, or history of the individual gave rise to the surname, such as his color, as black John, brown John, white John, afterwards transposed to John Brown, etc.; or it arose from his bulk, height, or strength, as Little, Long, Hardy, or Strong; or his mental or moral attributes, as Good, Wiley, Gay, Moody or Wise; or his qualities were poetically personified by applying to him the name of some animal, plant, or bird, as Fox or Wolf, Rose or Thorn, Martin or Swan; and it was in this way that the bulk of our surnames, that are not of foreign extraction, originated and became permanent. They grew into general use, without any law commanding their adoption, or prescribing any course or mode respecting them; for I know of but one instance of a positive statute commanding the taking of names or regulating the manner of selecting them, and that was limited to a particular locality. In the fourth year of the reign of Edward IV. an act was passed compelling every Irishman that dwelt within the English pale, to take an English surname, and enacting that it should be the name of some town, or of some color, as black or brown, or of some art or occupation, or of some office, which led to an extensive change of names in that part of Ireland, as a non-compliance was attended with a forfeiture of goods. But, though for several centuries the practice of giving or assuming surnames was general, it extended little farther than the particular individual of which it was the designation or mark. His descendants adopted it or not, at pleasure, or he assumed a new name himself, or others conferred upon him some characteristic appellation, which adhered to him and his descendants. This fluctuation and change, however, was materially arrested by a statute, passed 1 Henry V., c. 8, called the Statute of Additions, which required not only the name of the individual to be inserted in every writ or indictment, but, in addition, his calling, his estate or degree, and the town, hamlet, or place to which he belonged. And in the reign of Henry VIII., Cromwell, the secretary of the king, established a regulation, by

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which a record was required to be kept in every parish of births, marriages, and deaths; a regulation which, in connection with the previous act, operated to check the caprice of individuals in the matter of their names, and to fix them as durable appellations, for every man's name thereafter became a matter of record at his birth, his marriage and at his death; and this recording of such events in every family, led to the use of one name to designate the members of one family, which the record served to perpetuate; transmitting it from father to son, until the practice became general for all descendants to bear, and become known by, the name of a common ancestor. But this was the work of several centuries, and even at the present day, in remote and sparsely settled districts of England and Wales, the practice is not entirely extinct of assuming and changing surnames. All this, it will be seen, was brought about without any positive provision of law, other than those that have been referred to. By a usage, sufficiently general to be called universal, the son now bears the name of the father, and in turn transmits it to his own male descendants. Surnames, from their infinite variety, have now become a more certain mark of identity than the first name, for the whole number of Christian or first names now commonly in use do not exceed six hundred, while the directory of this city exhibits no less than twenty thousand varieties of surnames. It is the combination of the Christian and surname that now marks the individual's identity; and he is distinguished still more accurately by the use, now very general, of middle names or initial letters.

"But though the custom is wide spread and universal, for all males to bear the name of their parents, there is nothing in the law prohibiting a man from taking another name if he chooses. There is no penalty or punishment for so doing, nor any consequence growing out of it, except so far as it may lead to or cause a confounding of his identity. In some countries it is otherwise. In France, a law was passed in the second year of the first revolution (L. 6 Fructidor, Au. II.), and another (19 Nivose, Au. VI.), which is still in force (Codes Francais par Bourguignon et Royer—Collard, par. 34 and note; Dictionaire de Legislation Universal par Chabal-Chameane, vol. 2, p. 266), forbidding any citizen to bear any first name (prenom) or surname, than that which is expressed in the registry of his birth, or to add any surname to his proper name; but no enactment of the kind has ever been passed in England or in this state; but, on the contrary, there have been many instances in which individuals have changed their names and held offices of public

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trust, and become distinguished by the name they adopted. The poet Mallet may be cited as an illustration. His father was of the clan of the Macgregors; and when that clan was suppressed, and its name abolished by law in consequence of the violent acts of Rob Roy, he took the name of Malloch, by which name the son was known until he came to London in his twenty-sixth year, when, disliking his Scotch patronymic, he adopted the French name of Mallet, and by this name held an office under government, became distinguished in literature, and transmitted the name to his descendants. That such instances rarely occur, may be readily accounted for in the fact of the absence, usually, of any object to induce a man to change his name. In the circumstance that there is generally a just and honorable pride in bearing the name of one's ancestors, and in the further fact that it is scarcely in the power of a man to change his name, unless he goes to a place where he is unknown; for as long as he continues to abide where he is known, people will continue to call him by the name to which they are accustomed.

"It is this difficulty, I apprehend, mainly, that led to the practice of applying for the king's license, or the passage of a statute, in cases where the taking of a new name had become necessary in consequence of the devise of an estate upon that condition, as all persons will conform to what is decreed or enjoined by the sovereign authority of the state. Lord Mansfield seems to have thought in *Gulliver v. Ashby* (4 Bur. 1940), that the king's license, or an act of parliament, was essential to entitle a man to assume another name, but in later cases the right of an individual to take another name, without the king's license or an act of parliament, has been distinctly recognized; and the validity of acts done in the adopted name have been sustained even where they imposed a charge upon the public. In *The King v. The Inhabitants of Billingham* (3 Maule & Sel. 250), the question was, whether a pauper, whose baptismal and surname was Abraham Langley, and who, by that name, had a legal settlement in Billingham, could, with his wife and family, be charged upon that parish. He was married in another parish by the name of George Smith, and had been known in that parish for three years before his marriage by that name. The wife and children had no settlement in Billingham, unless they had acquired one by the marriage, and the point involved was the validity of the pauper's marriage by the name of George Smith; the marriage act of 26 Geo. II, c. 33, rendering it essential to the validity of a marriage that there should be a publication beforehand of the 'true Christian and surnames' of the parties. It was

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insisted that this had not been done—that the marriage was, therefore, void, and that the wife and children were not chargeable upon the parish of Billinghamst; but the court held that the publication of the banns by the name of George Smith—that being the name which the pauper had gained by reputation, and by which he was known at the time in the parish where he was married—was a publication of the true name within the meaning of the act. In a note at the end of this case, several decisions of Lord Stowell, in the Consistory Court, are collected. In one of them (*Frankland v. Nicholson*) Ann Nicholson was married, and the banns published in the name of Ann Ross. Sir William Scott, in reply to the argument that the proper Christian and surname of a party could not be altered except by the king's license or an act of the legislature, said, that there might be cases where names, acquired by general use and habit, would be taken as the true Christian and surname of a party, but as there was not sufficient evidence in the case before him to show that the woman had ever been known by the name of Ross, he annulled the marriage. In another case before him (*Mayhew v. Mayhew*), which was a proceeding for a divorce upon the ground of adultery, the woman set up that she had never been legally married, having been described in the publication of the banns as Sarah Kelso, when her real name was Sarah White. It was shown in reply that she had gone by several different names, but was generally known by the name of Kelso before the marriage, and upon this evidence he held the marriage to be valid.

"*Doe v. Yates* (5 Barn. & Ald. 544), is a case still more distinctly in point. An estate was devised upon condition that the devisee should take the surname of the testator. The will provided that, within three years after the devisee arrived at the age of twenty-one, he should procure his name to be altered to the testator's name of Luscombe, by act of parliament or in some other effectual way. The devisee, before he was of age and before he entered upon or was let into the possession of the estate, took the name of Luscombe, which name he continued thereafter to bear. At twenty-one he took possession of the estate, but suffered the three years to go by, without applying for the king's license or an act of parliament, to entitle him to use the name of Luscombe, and he continued to hold and enjoy the estate for eight years thereafter, when he conveyed it to the defendants. It was insisted that he had forfeited the estate by having failed to comply with the testator's directions within the three years after he reached twenty-one, in not obtaining or applying for the king's license, or an act of parliament authorizing him to take

the name of Luscombe. But the court gave judgment for the defendants, holding that the devisee had sufficiently taken the testator's name, and that it was not necessary for him to apply for an act of parliament or for the king's license. 'A name,' said Chief Justice Abbott, in delivering the judgment of the court, 'assumed by the voluntary act of a young man at his outset into life, adopted by all who knew him, and by which he is constantly called, becomes, for all purposes that occur to my mind, as much and effectually his name as if he had obtained an act of parliament to confer it upon him;' and there are numerous cases, both in this country and in England, holding that where a man enters into a contract or does any act in a particular name, that he may be sued by the name that he used, whatever his true name may be, and generally that wherever a man has done an act in a particular name, or where he makes a grant that it may always be shown in support of the validity of the act, that he was known by that name at and about the time when the act was done, though he may have been baptized or previously known by a different name. All that the law looks to is the identity of the individual, and when that is clearly established the act will be binding upon him and upon others. *Waterbury v. Mather*, 16 Wend. 611; *Griswold v. Sedgwick*, 6 Cow. 456; *Jones' Estate*, 27 Penn. 336; *Prettyman v. Wales*, 4 Harring. 299; *Toole v. Peterson*, 9 Ired. 180; *Selman v. Shackelforde*, 17 Geo. 615; *Williams v. Bryant*, 5 Mees. & Wels. 447; *Finch v. Cocken*, 5 Tyrw. 774; *Attorney General v. Hawkes*, 1 Cro. & Jer. 120; *The Queen v. Avery*, 18 A. & Ellis (N. S.) 576; Comyn's Digest, Fait. E. 3.

"I have gone into the examination of this question so minutely because it has never, so far as I am aware of, been previously investigated; and into the origin of the usage that now prevails in respect to names, because the works commonly referred to on matters of general knowledge are exceedingly barren of information upon the subject of personal nomenclature. The result of this examination shows, I think, there is nothing in the law to prevent the petitioner from continuing to call himself John Pike. If, as stated in the petition, he adopted it some years ago, engaged in business by that name, and is known among his business acquaintances and customers by that designation, there is no reason why he should not continue to use it. Any contract or obligation he may enter into, or which others may enter into with him by that name, or any grant or devise he may hereafter make by it, would be valid and binding; for, as an acquired and known designation, it has become as effectually his name as the one which he previously bore. I have no hesitation, there-

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fore, in saying that I think he may lawfully use it hereafter, in all transactions, as his name or designation.”

See, also, *Carlisle v. Peoples' Bank*, 122 Ala. 446; *Pease v. Pease*, 35 Conn. 131; *Reddick v. State*, 25 Fla. 112; *Parmelee v. Raymond*, 43 Ill. App. 609; *Graham v. Eisner*, 28 Ill. App. 269; *Clark v. Clark*, 19 Kan. 522; *Hommel v. Devinney*, 39 Mich. 522; *Chandler v. Coe*, 54 N. H. 561; *England v. New York Pub. Co.*, 8 Daly (N. Y. C. P.) 375; *Cooper v. Burr*, 45 Barb. (N. Y.) 9; *Linton et ux. v. First National Bank*, 10 Fed. 894.

We have notable illustrations of changing of names where the men afterwards occupied places of distinction and prominence in the public life of this nation. President Grant, at the age of seventeen years, was appointed to a place in the Military Academy at West Point. He was christened Hiram Ulysses Grant. The Congressman who recommended him for West Point by mistake recommended him as Ulysses S. Grant, and the appointment was made in that name. Whereupon, without any action by any court or Legislature, he adopted this name, and was ever afterwards known as Ulysses S. Grant.

President Cleveland was christened as Stephen Grover Cleveland, but he discarded the first name, adopting his middle name, and was known as Grover Cleveland; all of his state papers, both as Governor and as President, being thus signed.

Speaker Clark was christened as Beauchamp Clark, but he discarded that name, adopting simply the name “Champ,” and by that name he was elected to Congress and as Speaker.

The unfortunate John H. Mitchell, late Senator from the State of Oregon, was christened by the name of John, his surname then being Hipple. After reaching his majority, having removed from Pennsylvania to the Pacific Coast, he changed his name to John H. Mitchell, and by the adopted name he held many positions of honor and trust in the state of Oregon and served three terms in the United States Senate from that state.

The case being tried by the court without a jury, obviously the general finding in favor of defendant in error Jacob Mosier, alias Fred Mosier, was upon his theory and contention. Such a finding will be given, upon review here, the same weight as a

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verdict of a jury, there being evidence reasonably tending to support such theory and contention, although there may be evidence in the record tending to support the contention of the plaintiff in error. This court, under an unbroken line of decisions by it and the Supreme Court of the territory of Oklahoma, is not permitted to weigh the evidence where there is a conflict, but is bound by the finding of the trial court. *Deming Inv. Co. v. Lovv*, 31 Okla. 146, 120 Pac. 635.

It follows that the judgment of the lower court must be affirmed.

All the Justices concur.

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No. 2426. Opinion Filed April 1, 1913.

APPEAL AND ERROR—Questions of Fact. No error having been committed by the trial court in the admission or rejection of evidence, and the cause having been submitted under proper instructions to the jury, there being evidence reasonably supporting the verdict, the judgment thereon will be affirmed on review in this court.

(Syllabus by the Court.)

Error from District Court, Alfalfa County;
M. C. Garber, Judge.

Action by Phillip Gerber against Anselmo Jack. Judgment for plaintiff, and defendant brings error. Affirmed.

Wilson & Ross, for plaintiff in error.

E. W. Snoddy, for defendant in error.

WILLIAMS, J. The defendant in error, Phillip Gerber, as plaintiff, sued the plaintiff in error, Anselmo Jack, as defendant, in the lower court on December 18, 1909, for the recovery of a certain tract of land, it being a part of the southwest quarter of section twenty-three, township twenty-eight north, and range eleven west, of the Indian Base and Meridian, held by said defendant under a claim that the same was a part of the northwest quarter of said section.

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It is admitted that the plaintiff was the legal and equitable owner in fee simple of said southwest quarter, and the defendant of the northwest quarter. The tract in dispute is one-half mile long east and west and twelve feet wide at the east end and twenty-four feet at the west end, lying along the boundary line between the quarter sections.

It was essential to determine the boundary between the two said quarter sections in order to adjudicate the owner of said strip of land. Trial was had on March 9, 1910, on the issues as framed, and a verdict rendered in favor of the plaintiff. Defendant in due time filed a motion for a new trial, which was overruled, and exceptions saved by proceeding in error. The defendant seeks to have set aside the judgment awarded in favor of the plaintiff.

The only question essential to be determined in this case is as to whether a certain survey made by the county surveyor was binding upon the plaintiff. It is conceded by counsel for the defendant (plaintiff in error) that if he was bound by said survey he could not prevail in the action in the lower court, and in that extent the court did not err in giving the instruction complained of.

The county surveyor is required to "make, in a good and professional manner, all surveys of land within his county which he may be called upon by the owner thereof, or his representative, or directed by the district or probate courts, or the board of county commissioners, to make" (section 1786, Comp. Laws 1909; section 1731, St. Okla. 1890), and to "transcribe the field notes and plats of such surveys into convenient and substantial record books," etc. Such books are "competent evidence in all courts of the facts therein set forth." Section 1787, Comp. Laws 1909; section 1300, Wilson's Rev. & Ann. St. 1903.

"The resurvey and subdivision of lands by all surveyors shall be according to the laws of the United States," etc. (Section 1788, Comp. Laws 1909; section 1301, Wilson's Rev. & Ann. St. 1903.)

"Whenever the survey is made of lines or monuments in dispute between parties * * * the chainmen must be of disinterested persons, approved and sworn by the surveyor, to measure justly and impartially to the best of their skill and ability." (Section 1789, Comp. Laws 1909; section 1302, Wilson's Rev. & Ann. St. 1903.)

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"The record of the field notes and plats shall show distinctly of what piece of land it is a survey, at whose request it was made, what owners were notified and present at the date of the survey, the name of the chainmen, and that they were approved and sworn to by the surveyor when so required by law. * * *"
(Section 1790, Comp. Laws, 1909; section 1303, Wilson's Rev. & Ann. St. 1903.)

"In retracing lines or making any survey he shall take care to observe and follow the boundaries and monuments as run and marked by the original survey, but shall not give weight to partial and doubtful evidence or appearances of monuments, the recognition of which shall require the presumption of marked errors in the original survey, and he shall note an exact description of such apparent monuments." (Section 1791, Comp. Laws 1909; section 1304, Wilson's Rev. & Ann. St. 1903.)

"When two or more owners of adjacent or adjoining tracts of land shall desire to permanently establish the corners and boundaries thereof, they shall notify the county surveyor to make a survey thereof and establish such corners and boundaries, and shall furnish him the names and addresses of all persons residing in the county and elsewhere, so far as known, who may be affected by such survey. * * * Due proof of service of notice, as herein provided, shall be made and entered of record in the office of the county surveyor." (Section 1797, Comp. Laws 1909; section 1310, Wilson's Rev. & Ann. St. 1903.)

The county surveyor, on the day mentioned in the notice, or the next day thereafter, shall proceed to make the survey, but he may, for good cause shown, adjourn from time to time. He may, upon the application of any persons interested in the survey, or upon his motion, take the evidence of any witness or witnesses who may be produced to prove any point material to such survey, and such testimony shall be reduced to writing, and, together with an accurate plat and field notes of such survey, shall be filed in the office of the county surveyor within thirty days after the completion of such survey. Section 1798, Comp. Laws 1909; section 1311, Wilson's Rev. & Ann. St. 1903.

"Upon the filing of the report of each survey, any person served with notice of the survey, as herein provided, and being aggrieved by such survey, or the costs thereof, may at any time within thirty days after the filing of such report appeal to the district court of the county. * * *"
(Section 1799, Comp. Laws 1909; section 1312, Wilson's Rev. & Ann. St. 1903.)

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"The corners and boundaries established in any survey, made in pursuance of any agreement, or in any survey made in conformity with the provisions of this act, where no appeal is taken from the surveyor's report * * * shall be held and considered as permanently established, and shall not thereafter be changed." (Section 1801, Comp. Laws 1909; section 1314, Wilson's Rev. & Ann. St. 1903.)

When any survey made in pursuance of an agreement, or of legal notice, shall have become final, it shall be the duty of the county surveyor to record his report thereof, in the record of permanent surveys. Section 1802, Comp. Laws 1909; section 1315, Wilson's Rev. & Ann. St. 1903.

The court instructed the jury as follows:

"You are instructed that this controversy arises over the location of the half section line between the plaintiff and the defendant and this is an issue of fact for you to determine in this case. The records of the Gilmore and Haviland surveys have been admitted in evidence, together with the testimony of the several witnesses who have appeared upon the stand relative to monuments of title in relation thereto. You are instructed that neither one of the surveys are conclusive or binding upon you, but you may take them into consideration, together with all the other evidence in the case, in determining where said half section line should be located."

This instruction was excepted to by the defendant, who asked the following instruction, which was refused:

"You are instructed that, if you find from the evidence that William Haviland, while surveyor of Woods county, surveyed the disputed boundary in question and that the plaintiff Gerber participated in such survey, then he is bound by the result of such survey, unless you further find that on account of fraud and misrepresentation on the part of the county surveyor of Woods county, the plaintiff was prevented from taking his appeal."

The record of permanent surveys as introduced in evidence states that the survey was made in pursuance of a petition filed August 1, 1905, when the petition is dated August 4, 1905. The record describes the survey as one upon application of N. L. Travers, S. W. $\frac{1}{4}$, and W. H. Travers, S. E. $\frac{1}{4}$, and A. Jack. No land is described as belonging to the latter. The record recites that the county surveyor fixed August 5th as the date on

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which to begin the survey and continued until August 15th to serve further notice, and — day of August, as the day upon which he would begin to make the survey. The record in another place shows that he fixed August 14th as the day to begin, and swore two chainmen upon that day. The record also shows that he began on August 6th and continued until August 10th and completed on August 16th. It does not disclose at whose request the survey was made, as it states that it was on the application of N. L. and W. H. Travers, whose land is described, and A. Jack, whose land is not described, while the petition for the survey seems to have been signed by S. J. Graham, Ans. Jack, and Phillip Gerber. The county surveyor appears to have lumped two surveys in one record—the one in dispute and one founded upon the petition signed by N. L. and W. H. Travers. The law evidently contemplates that the record of each survey shall be kept separate, so that upon the filing of the report any person may appeal from such survey and will not have to appeal from more than one survey. The record does not show a copy of the field notes in any form. The petition upon which this survey was had does not give the names and addresses of any persons who might have been affected by the survey. It is disclosed by the record that on August 7, 1905, the county surveyor mailed notices for the parties affected to Phillip Gerber as his deputy; no other evidence being contained in the record to show service. The record of permanent surveys is so defective as to be unreliable: the provisions of the statute not appearing to have been strictly followed.

In *Holliday v. Maddox*, 39 Kan. 359, 18 Pac. 299, it is said:

"The survey made by Walton as county surveyor was not offered for the purpose of showing that a legal and binding survey was made, but was offered and received, and it is all that is now claimed for it, that it was some evidence tending to show the correct line and corner. It was of the same character and of the same weight as that of the survey made by County Surveyor Wood, years later. It is not claimed for either of these surveys that they were made in strict compliance with the requirements of the statute. They were simply the surveys made by the county surveyors at the request of somebody in interest. As far as the evidence shows, no notice was given as required

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by law to make the survey binding. Each party could have made as many surveys as he desired, but surveys so made would not be binding, though they would be competent as evidence, and would be received by the court for what they were worth."

In *Schwab v. Stoneback*, 49 Kan. 607, 31 Pac. 142, it is said:

"It will be observed that the statute requires the surveyor to make the survey at the time mentioned in the notice, and he must file the evidence taken together with an accurate plat of the land surveyed, in the office of register of deeds of the county, within ten days after the completion of the survey. This he did not do. There was nothing to show an adjournment for any definite time. We do not think that there was such a compliance with the statute as made the survey and plat filed by the surveyor on the 30th of April conclusive. The subsequent section of the statute gives any person interested the right to appeal from the report of the surveyor to the district court within thirty days from the filing of the report. No one could tell when to take an appeal, if the surveyor were allowed any indefinite time in which to conclude the survey and file his report. It was, therefore, material error for the court to hold that the survey made by the county surveyor was final, conclusive, and binding, and refuse to admit any evidence as to the location of the division line between lots seven and ten prior to the survey.

"The report and plat were doubtless competent evidence, as any other private survey might have been, but it was not conclusive, for the reason that the statute was not strictly pursued. * * *

"It is a sound and inflexible rule of law, that where special proceedings are authorized by statute, by which the estate of the one may be diverted and transferred to another, every material provision of the statute must be complied with. The owner has a right to insist upon a strict performance of all the material requirements, especially those designed for his security, and the nonobservance of which may operate to his prejudice."

See, also, *Marsh v. Chesnut*, 14 Ill. 223.

We conclude that the cause was submitted to the jury under proper instructions.

The conclusion herein reached seems also to be in harmony with *Watkins v. Havighorst*, 13 Okla. 128, 74 Pac. 318.

It follows that the judgment of the lower court must be affirmed.

HAYES, C. J., and KANE and TURNER, JJ., concur;
DUNN, J., not participating.

Carter v. Belt et al.

CARTER v. BELT *et al.*

No. 3806. Opinion Filed April 1, 1913.

APPEAL AND ERROR—Review—New Trial—Necessity of Motion—Settlement of Case-Made. When it is essential that the ruling of the trial court be assigned in the motion for a new trial as a ground therefor for the same to be considered on review in this court, and it appears that no motion for a new trial was filed within three days from the rendition of the verdict, and no proper excuse is shown for not so filing same, a new trial will not be awarded in this court on the ground that the trial judge afterwards died and on account of a hiatus in the procedure plaintiff in error was prevented from having the case-made settled and signed preliminary to having the action of the trial court reviewed by proceeding in error.

(Syllabus by the Court.)

*Error from Swanson County Court;
Frank P. Cease, Judge.*

Action between D. M. Carter, trading under the firm and style of Manitou Hardware & Implement Company, and R. J. Belt and others. From the judgment, Carter brings error. Dismissed.

H. P. McGuire, for plaintiff in error.

John W. Williams and *O. B. Riegal*, for defendants in error.

WILLIAMS, J. The defendants in error move to dismiss this proceeding in error on the grounds (1) that the record attached to the petition in error in this court is neither certified to by the clerk as a transcript nor has the purported case-made been approved by the trial judge, and (2) that the motion for a new trial was not filed within three days after the returning of a verdict.

1. The plaintiff in error admits that he has wholly failed to comply with the law and rules of this court in the matter of the prosecution of this proceeding in error. He attempts to excuse such failure on account of the dissolution of Swanson county by order of the district court of Comanche county, which was

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afterwards affirmed on review by this court, and the death of the trial judge. The defendants in error set up in their reply, which is not denied on the part of the plaintiff in error, that the case-made as prepared by the plaintiff in error was served on the attorney of record for the defendants in error on July 7, 1911, prior to the time of the rendition of the judgment dissolving the county of Swanson and the death of Frank P. Cease, its county judge. It is not shown that the plaintiff in error by reasonable diligence, after the service of the said case-made, could not have had the same signed and settled by the trial judge prior to the time of his death.

It appears that the motion for a new trial was not filed within three days from the rendition of the verdict. This was essential, unless the defeated party was unavoidably prevented from so doing. *Ricly v. Robertson*, 29 Okla. 181, 115 Pac. 877, and authorities therein cited; *Joiner v. Goldsmith*, 25 Okla. 840, 107 Pac. 733. The questions alleged in the petition in error as error on the part of the trial court can be reviewed here only after being raised in the lower court by means of a motion for new trial. *Richardson et vir v. Beidleman et al.*, 33 Okla. 463, 126 Pac. 818.

It is not essential to pass on the other questions raised.

The proceeding in error must be dismissed.

All the Justices concur.

APPLEBY et al. v. DOWDEN.

No. 4427. Opinion Filed April 1, 1913.

1. **APPEAL AND ERROR—Necessary Parties—Joint Judgment.** All parties to a joint judgment, either as plaintiffs or defendants in error, must be joined in a proceeding in error in this court to review such judgment.
2. **SAME—Service of Case-Made.** Where a judgment of the trial court is sought to be reviewed by means of a petition in error with case-made attached, the case-made must be served upon all parties required to be joined either as plaintiffs or defendants in error in the proceeding in error.

(Syllabus by the Court.)

Appleby et al. v. Dowden.

*Error from District Court, Grady County;
J. T. Johnson, Judge.*

Action by E. Dowden against J. B. Appleby and others. Judgment for plaintiff, and certain defendants bring error. Dismissed.

J. W. Bartholomew, for plaintiffs in error.

Bond & Melton, for defendant in error.

WILLIAMS, J. On January 23, 1911, judgment was rendered against the plaintiffs in error, after a trial on the issues framed, and also against certain other defendants in the lower court by default, such persons not being made parties to this proceeding in error, adjudging that the defendant in error, as plaintiff in the trial court, was the owner of certain lands and that the title thereto was prior and superior to any title, interest, or claim of said defendants by reason of the segregation of said land as a government town site; and it was further adjudged that the said plaintiff was the owner and seized in fee of the equitable title of certain other described land, and that his title thereto was valid and perfect and prior and superior to any and all right and interest of said defendants, naming them, by reason of the segregation of said lands as a government town site by the Secretary of the Interior and any and all proceedings pursuant thereto.

It was further adjudged that the order of the Secretary of the Interior of May 27, 1905, segregating one hundred and sixty and ten one-hundredths acres of land for town-site purposes, which included the land hereinbefore referred to, was void and of no force and effect in so far as the same affected the said land of the plaintiff, and that said order of the Secretary of the Interior of May 7, 1905, now of record in the office of the Commissioner to the Five Civilized Tribes, at Muskogee, Oklahoma, the schedule, appraisement and sale of lots and blocks of land pursuant to said order by the Choctaw and Chickasaw Town-site Commission, the delivery of receipts for payments therefor, and the issuance and recording of patents pursuant to such proceedings, where such patents describe lots or blocks of land embraced

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in the lands of the plaintiff and the recording of such patents in the office of the register of deeds in Grady county, Oklahoma, were without authority of law and cast a cloud on plaintiff's title to said land; and said order of the Secretary of the Interior, the appraisal and schedule of lots and blocks of land thereunder by the Choctaw and Chickasaw Town-site Commission, receipts for payments made thereunder and all patents to lots and blocks of land embraced within the land belonging to the plaintiff recorded in the office of the register of deeds of Grady county, Oklahoma, or in the office of the Commissioner to the Five Civilized Tribes, at Muskogee, Oklahoma, were canceled, vacated, set aside, and removed as a cloud upon the title of plaintiff to said land.

It was further adjudged that:

"* * * The title of said plaintiff in said land be and the same is hereby settled and quieted in the plaintiff as against all claims or demands of the defendants or those claiming under them by reason of the segregation of said land for town-site purposes, and said defendants and each of them are hereby perpetually enjoined from setting up any claim to said land of the plaintiff by reason of said order of the Secretary of the Interior segregating the said land for town-site purposes and any and all proceedings had pursuant thereto."

It was further ordered that the plaintiff recover of said defendants his costs therein.

The motion for a new trial, being filed in due time, was overruled and exceptions saved. Neither was the case-made served upon J. W. Boland and numerous other defendants against whom the judgment was rendered by default jointly with the other defendants, who are plaintiffs in error in this proceeding, not only quieting the title in the plaintiff (defendant in error) by joint judgment against all of said defendants, but also by removing all cloud of title thereon and judgment for the costs, nor are they joined as either plaintiffs or defendants in error.

In *May et al. v. Fitzpatrick et al.*, ante, p. 45, 127 Pac. 702, it was held:

"All parties to a joint judgment must be joined in a proceeding in error in this court to review such judgment either as plaintiffs or defendants in error.

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“(a) After the expiration of the time for commencing the proceeding in error, a necessary party to a proceeding in error, in order for this court to acquire jurisdiction thereof, may not then be made for the first time in this court.”

If the judgment of the trial court is to be reviewed by means of petition in error with case-made attached, the case-made should be served on all parties required to be joined in the proceeding in error in this court. *Price et al. v. Covington*, 29 Okla. 854, 119 Pac. 626; *May et al. v. Fitzpatrick et al.*, *supra*; *Cook et al. v. State et al.*, *ante*, 130 Pac. 300.

In the latter case numerous decisions theretofore rendered by this court are cited as sustaining the rule therein announced. These decisions were based upon Kansas cases that were decided prior to the time of the adoption of the Kansas Practice Act by the Legislature of the territory of Oklahoma, and were, therefore, controlling on this court as a successor to the Supreme Court of Oklahoma Territory. These decisions are numerous and point out clearly the preliminary jurisdictional requirements in order for this court to acquire jurisdiction of the proceeding in error; and wherever parties seeking to invoke the jurisdiction of this court by proceedings in error fail to comply with these preliminary requirements as to parties, etc., this court has no alternative other than to dismiss the same.

The proceeding is therefore dismissed.

KANE, DUNN, and TURNER, JJ., concur; HAYES, C. J., not participating.

In re Assessment of Oklahoma Natural Gas Co.

In re ASSESSMENT OF OKLAHOMA NATURAL
GAS CO.

No. 3107. Opinion Filed April 8, 1913.

FORMER DECISION CONTROLLING. Report of referee confirmed and judgment ordered accordingly, upon the authority of *In re Assessment of Osage & Oklahoma Gas Co.*, ante, p. 154, 128 Pac. 692.

(Syllabus by the Court.)

Appeal from State Board of Equalization.

Report of Referee confirmed.

Chas. West, Atty. Gen., and *W. C. Reeves*, Asst. Atty. Gen.,
for the State.

Flynn, Chambers, Lowe & Richardson, for Oklahoma Nat-
ural Gas Co.

KANE, J. This is an appeal from the action of the State Board of Equalization in assessing the property of the Oklahoma Natural Gas Company for taxation for the year 1911. Upon a trial *de novo* in this court, by agreement, a referee was appointed to hear the evidence and report his findings thereon. The cause now comes on to be heard upon exceptions to the report of the referee.

The same questions are involved and the same referee was appointed by the court in this proceeding as *In re Assessment of Osage & Oklahoma Gas Co.*, ante, p. 154, 128 Pac. 692, and the report herein is based upon the same class of evidence, and the findings and conclusions of the referee are to the same effect. As the report of the referee was confirmed in that case, it must also be sustained in this.

It is therefore ordered that the report of the referee be confirmed and judgment entered accordingly.

HAYES, C. J., and DUNN and TURNER, JJ., concur;
WILLIAMS, J., not participating.

In re Assessment of Caney River Gas Co.

In re ASSESSMENT OF CANEY RIVER GAS CO.

No. 3105. Opinion Filed April 8, 1913.

FORMER DECISION CONTROLLING. Report of referee confirmed and judgment ordered accordingly, upon the authority of *In re Assessment of Osage & Oklahoma Gas Co.*, ante, p. 154, 128 Pac. 692, and *In re Assessment of Oklahoma Natural Gas Co.*, ante, just handed down.

(Syllabus by the Court.)

Appeal from State Board of Equalization.

Report of Referee confirmed.

Chas. West, Atty. Gen., and *W. C. Recves*, Asst. Atty. Gen., for the State.

KANE, J. This is an appeal by the Caney River Gas Company from the action of the State Board of Equalization in assessing its property for taxation for the year 1911.

This cause in all respects is identical with *In re Assessment of Osage & Oklahoma Gas Co.*, ante, p. 154, 128 Pac. 692, and *In re Assessment of Oklahoma Natural Gas Co.*, ante, just handed down. Upon the authority of those cases the report of the referee herein is confirmed and judgment entered accordingly.

HAYES, C. J., and DUNN and TURNER, JJ., concur; WILLIAMS, J., not participating.

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BOARD OF COM'RS OF GARFIELD COUNTY v.
HUETT *et al.*

No. 3667. Opinion Filed March 15, 1913.

FINES—Disposition of Money—Rights of County—Violations of Anti-Trust Laws. Where, prior to the admission of the state into the Union, pursuant to Wilson's Rev. & Ann. St. 1903, c. 83, entitled "Trusts," on relation of the county attorney, defendant was sued in the name of the territory of Oklahoma to enjoin an unlawful combination in restraint of trade; and where the Attorney General in the name of the state intervened and recovered \$75,000 as a fine imposed for violations of the provisions of Comp. Laws 1909, c. 113, art. 1, secs. 8800-8816, inclusive; and where the trial court, pursuant to stipulation of all parties in interest, ordered paid to the county attorney and his successor in office \$15,000 of the fine collected, which was done, held, in a suit against them, by the board of county commissioners of the county where such fine was collected, to recover said \$15,000, that said board had no interest therein under Comp. Laws 1909, art. 62, sec. 2852, c. 25, entitled "Crimes and Punishment."

(Syllabus by the Court.)

Error from District Court, Garfield County;
James W. Steen, Judge.

Action by the board of commissioners of Garfield county against Daniel Huett and H. G. McKeever. Judgment for defendants, and plaintiff brings error. Affirmed.

Charles N. Harmon, Co. Atty., and Dale & Bierer, for plaintiff in error.

Parker & Simons, D. M. Walker, W. O. Cromwell, and Robberts, Curran & Otjen, for defendants in error.

TURNER, J. On June 7, 1911, the board of county commissioners of Garfield county, plaintiff in error, sued Daniel Huett and H. G. McKeever, defendants in error, in the district court in that county. The petition, after alleging that three certain persons constituted the plaintiff board; that on November 6, 1904, defendant Huett was duly elected county attorney of that county and subsequently qualified and entered upon the dis-

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charge of his duties as such and performed the same until November 16, 1907; that the next day the defendant McKeever was duly elected county attorney of that county, subsequently qualified and entered upon the discharge of his duties as such, and continued to discharge the same until January 11, 1911, substantially states:

That on April 18, 1907, a certain action was commenced in said court entitled "The Territory of Oklahoma on Information and Relation of Daniel Huett, County Attorney of Garfield County, therein, plaintiff, v. The Waters-Pierce Oil Company, defendant"; that therein plaintiff charged defendant with a violation of the trust laws of the state, in that defendant promoted a pool, trust, agreement, and combination in restraint of trade for the purpose of controlling the competition in the production of naphtha, benzine, gasoline, kerosene, lubricating oils, and other products of petroleum sold and offered for sale in that and other counties of the territory of Oklahoma, and prayed that defendant be enjoined from so doing and for costs; that although said petition was signed and verified by "Charles West, attorney for plaintiff," the same was drawn upon the relation of Daniel Huett, county attorney of Garfield county, territory of Oklahoma, who prosecuted the same in behalf of said territory—a copy of said petition being made a part thereof and marked "Exhibit D." The petition further alleged that on October 30, 1908, there was filed in said cause by Charles West, Attorney General for the state of Oklahoma, "a petition in interpleader supplementary," entitled: "The Territory of Oklahoma on the Information and Relation of Daniel Huett, County Attorney of Garfield County therein, and the State of Oklahoma on the Information and Relation of Charles West, Attorney General, plaintiff, v. The Waters-Pierce Oil Company, a corporation, defendant;" that therein plaintiff charged the defendant Waters-Pierce Oil Company with violating the trust laws of the state of Oklahoma, in that said defendant had formed and made a pool, trust, agreement, and combination for the purpose of controlling competition in the sale of naphtha, benzine, gasoline, kerosene, lubricating oils, and other products of petroleum sold and offered for sale by them in Gar-

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field county, state of Oklahoma, in restraint of trade and in violation of article 1, c. 83, pages 750-757, inclusive, of the Sess. Laws 1907-08, and prayed judgment for the plaintiff and against defendant, and that it be enjoined from committing any of the acts complained of and from asking and receiving in the state more than a reasonable price for said products and from discriminating between associations or corporations and sections and communities and citizens in said state, etc., and that the corporate rights of defendant be forfeited and a receiver appointed to preserve to the public the benefit of the trust in the hands of the defendant, and for costs and penalties thereby incurred in the sum of \$10,000 for each of said offenses and each day thereof—a copy of said petition being made a part thereof and marked "Exhibit E." The petition further alleges that issues were joined thereon and said cause came on for trial in said court, whereupon on July 7, 1910, there was filed therein a written stipulation signed by said defendants Huett and McKeever, as attorneys for Garfield county, and Charles West, Attorney General, for the plaintiff and certain parties (naming them) for defendant; that therein it was agreed that defendant would confess judgment and be fined in the sum of \$75,000, to be paid, \$25,000 in 60 days, \$25,000 in six months, and \$25,000 in nine months from that date; that pursuant thereto, upon said stipulation being that day presented to the court, judgment in full settlement of said cause was rendered and entered accordingly—a copy of said judgment being made a part of the petition and marked "Exhibit B." The petition further alleges that on the same day a written application for attorneys' fees alleged to have been earned in said cause was presented to the court and an order therein obtained directing that one-fifth of said fine of \$75,000, or \$15,000, be paid to said Huett and McKeever for their services as county attorneys of Garfield county in the prosecution of said cause, and that they as such and upon that authority alone received said sum out of said fine so assessed—copies of said application and order being made parts of the petition and marked "Exhibits F and C." The petition further alleged that said order was *coram non judice* and void; that defendants failed

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to turn over said \$15,000 to the county treasurer of Garfield county on demand, but converted the same to their own use; that said sum of right should be paid into the treasury of Garfield county and credited to the school fund—wherefore, the plaintiff board prayed judgment against defendants for said amount, with interest and costs.

On November 2, 1911, a demurrer was sustained to said petition, and plaintiff refused to plead further, whereupon judgment was rendered and entered accordingly, and plaintiff brings the case here.

The following questions are raised by this record and have been argued by counsel: Have the defendants, Daniel Huett, county attorney for Garfield county for the term immediately preceding the erection of the state, and H. G. McKeever, county attorney of said county from the time of the erection of the state up to and including the time of the trial of the action in the lower court when the \$15,000 involved in this action was accepted and retained by them, a right to retain any part of the \$75,000 fine assessed against the Waters-Pierce Oil Company, or should all of said sum so retained have been paid into the county treasury of said county?

The order of the trial court is as follows:

"Territory of Oklahoma *ex rel.* State of Oklahoma *ex rel.* plaintiff, v. Waters-Pierce Oil Company, defendant. No. 2626. Order.

"Now, to wit, on the 7th day of July, 1910, the above matter comes up before the court upon an application of H. G. McKeever and Dan Huett for an allowance of attorneys' fees in the above-entitled cause, and for an allowance of a due and just proportion of the fine in the above-entitled cause, proper to be paid to the county of Garfield.

"And thereupon the court finds that the said H. G. McKeever and Dan Huett are entitled to one-fifth of the fine herein rendered under section 8819, of Snyder's Statutes of Oklahoma, and that they are entitled to receive \$15,000 of the total fine, paid by the defendants in the above-entitled cause; and the court further finds that \$10,000 is a just and equitable proportion of the county of Garfield to receive from the said fine, and that the balance of said fine, to wit, \$50,000, should be paid by the defendant herein to the state of Oklahoma.

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"The defendant is therefore ordered and directed to pay H. G. McKeever and Dan Huett, the sum of \$15,000; to the treasurer of Garfield county, \$10,000, and the remainder of said fine, to wit, \$50,000, to the Treasurer of the state of Oklahoma, all of which said payments shall be made in three equal payments, each upon the 6th day of September, 1910, the 6th day of January, 1911, and the 6th day of April, 1911."

On the same day, but prior to the entering of said order, the following journal entry had been made:

"Now on the 7th day of July, 1910, comes the parties hereto, the state of Oklahoma, by its Attorney General, Charles West, H. G. McKeever, county attorney, and Daniel Huett, and the defendant, Waters-Pierce Oil Company, by its attorneys, J. D. Johnson, H. S. Priest, E. B. Perkins, W. A. Ledbetter, and Parker & Simons, and announce ready for trial, a jury being waived, submit the matter of fact as well as the matter of law to the court; and the pleadings and evidence and stipulations being submitted to the court, the court finds for the plaintiff and against the defendant, the Waters-Pierce Oil Company, upon the allegations of the petitions, and that the defendant, as alleged therein, has not offered its commodities upon reasonable terms without discrimination, as provided by law, and the court confirms and approves the agreement and stipulations of the parties herein, including the agreement that this judgment shall be a bar to all prosecutions for the causes of action alleged in the pleadings, and therefore:

"It is considered, ordered, and adjudged by the court that the plaintiff, the state of Oklahoma, recover of the defendant, the Waters-Pierce Oil Company, judgment as a fine of the sum of seventy-five thousand dollars, payable twenty-five thousand dollars in sixty days from this date, twenty-five thousand dollars in six months from this date, and twenty-five thousand dollars in nine months from this date, in full settlement of the causes of action alleged in the pleadings, and it is ordered and decreed that the defendant, the Waters-Pierce Oil Company, and all its officers, agents, employees and servants of every kind and character whatsoever, be and are hereby enjoined from making or entering into any agreement, contract or arrangement, or maintaining any trade practice or practices in restraint of trade in petroleum products in the state of Oklahoma.

"A. H. HUSTON, Judge."

Was this order, made by the trial judge, *res judicata*, or was the county or state estopped thereby?

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"A judgment rendered by the trial court having jurisdiction over the subject-matter and the person, is unquestionably conclusive and binding on the parties, unless reversed or set aside in some mode or manner prescribed by law. But it is essential to the validity of a judgment *in personam*, that the court should have jurisdiction over the parties, and if reached without such jurisdiction it is a mere nullity. Such a judgment is not merely erroneous because of some irregularity in the mode of proceeding, or error on the part of the court in the application of the law to the particular case, and for which the party aggrieved must seek a remedy by appeal or writ of error, but, being a judgment rendered without jurisdiction, it is absolutely void, and may be assailed at all times, and in all proceedings by which it is sought to be enforced." (1 Herman on Estoppel, vol. 1, sec. 62, p. 63.)

"There are several elements necessary to a plea of *res judicata*. They may be designated as principal and collateral—the latter being a final judgment, upon the merits, between the same parties, for the same cause of action. The principal element is that it must be a valid judgment. That is, it must be rendered by a court legally constituted, having jurisdiction of the cause and the person. Without jurisdiction there is no validity or vitality to the judgment." (1 Herman on Estoppel, vol. 1, sec. 64, p. 65.)

The action in the lower court was in favor of the state against the Waters-Pierce Oil Company. By section 1594, Comp. Laws 1909, it is made the duty of every county attorney "to appear in the district courts of their respective counties and prosecute and defend, on behalf of the state, or his county, all actions or proceedings, civil or criminal, in which the state or county is interested as a party." The question of the attorneys for the state being entitled to attorney's fees was not an issue in this case.

The case of *Harris v. Beavan et al.*, 74 Ky. (Bush) 254, appears to be in point. In that case an order had been made against the commonwealth directing that fifty per cent. of a certain fine be endorsed for the benefit of the commonwealth attorney. This was held to be "not a judicial determination of his right to receive it, the state being unrepresented." In that case the court said:

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"The rights of the commonwealth were adverse to the rights of one claiming as prosecutor, and it was necessary, before an order of court could divest the right of the state, that there should be opportunity for defense by the commonwealth against the claim asserted by the prosecutor. If a person other than the commonwealth's attorney had made claim as prosecutor to a part of the fund, it may be that an order made when the commonwealth's attorney was in court would have been effectual to vest in the prosecutor a right to the per cent. given him by the statute; but when the commonwealth's attorney is the person claiming as prosecutor, the commonwealth is unrepresented and cannot be deemed to have been in court for the purpose of litigation, and the order made must be deemed *coram non judice*, and void."

Under the Trust Act of December 25, 1890, no civil penalty was provided, but a violation of the act was declared to be a misdemeanor, and upon conviction thereof the defendant was to be fined not less than \$50 and not more than \$500. The Trust Act, approved June 10, 1908, provides for a criminal penalty of not less than \$50 and not more than \$10,000, and further:

"And any sum which might be assessed as a fine by way of punishment for a crime as in this act provided, may be recovered by the state as a penalty in civil action in addition to, or irrespective of, the assessment and assessability of said fine, either before, after or simultaneously with the pendency of said criminal action." (Section 6, art. 1, c. 83, Sess. Laws 1907-08.)

Section 9 of the Act of June 10, 1908, provides:

"It shall be the duty of the county attorneys of the several counties of this state, as well as the Attorney General of the state, to prosecute all actions to enforce the criminal provisions of this act."

This section omits the provision as to the payment of part of the fine to the prosecuting attorney.

Section 18 of the Schedule of the Constitution (section 382, Williams' Ann. Const. Okla.) provides:

"Until otherwise provided by law, the terms, duties, powers, qualifications, and salary and compensation of all county and township officers, not otherwise provided by this Constitution, shall be as now provided by the laws of the territory of Oklahoma for like named officers, and the duties and compensation of the probate judge under such laws shall devolve upon and belong

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to the judge of the county court: Provided, that the term of office of those elected at the time of the adoption of this Constitution, or first appointed under the provisions of the laws extended in force in the state, shall expire on the second Monday of January in the year nineteen hundred and eleven: And provided further, that county attorneys and judges of the county court of the several counties of the state, having a population of more than twenty thousand shall be paid a salary of two thousand dollars per annum; and of counties having a population of more than thirty thousand, a salary of twenty-five hundred dollars per annum; and of counties having a population of more than forty thousand, a salary of three thousand dollars per annum; such salaries to be paid in the same manner as is provided by law in force in the territory of Oklahoma for the payment of salaries to county attorneys."

The special federal census taken in the year 1907 shows that the population of Garfield county exceeded twenty thousand. By statute this census was made the official census for this state. Section 583, Comp. Laws 1909; Sess. Laws 1907-08, p. 165.

The provision of section 18 of the Schedule providing compensation for the county attorney of Garfield county for the term for which the defendant McKeever was elected, which began at the erection of the state, excluded the fee provided by section 6623 of the Statutes of Oklahoma Territory, 1890, regardless of whether section 6623, *supra*, was repealed by section 9 of the Act of June 10, 1908, *supra*. *Ticer v. State, ante*, p. 1, 128 Pac. 493.

Section 5, Act December 25, 1890 (section 6623, St. Okla. 1890), provides as follows:

"It shall be the duty of the prosecuting attorneys in their respective counties, to enforce the foregoing provisions of this act; and any prosecuting attorney securing a conviction under the provisions of this act, shall be entitled in addition to such fee or salary as by law he is allowed for such prosecution, to one-fifth of the fine received."

Even if it be conceded that this conviction or fine was imposed under this act, it was not during the term of the defendant Daniel Huett, and even if said section 6623 applied, he would not be entitled to any fee therefor. In the judgment the state of Oklahoma recovered of the defendant the Waters-Pierce Oil

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Company judgment as a fine in the sum of \$75,000. This fine was payable to the state, and this claim of the defendants was an adverse claim to the state, and could be only recovered in a proceeding authorized by statute. The defendants could not sue the state for such claim without its consent, and this consent could only be given by the Legislature. *Love et al. v. Filtsch et al.*, 33 Okla. 131, 124 Pac. 30. We reach the conclusion that the defendants were not entitled to this fee in the sum of \$15,000, or any other amount.

In support of the proposition that the court erred in sustaining the demurrer, plaintiff contends that it is entitled to recover this \$15,000 by reason of Comp. Laws 1909, which reads:

"Section 2852. All fines, forfeitures and pecuniary penalties prescribed as a punishment by any of the provisions of this chapter, when collected, shall be paid into the treasury and credited to the school fund of the county where such fines are collected."

Said section is amendatory of another section. As the section amended appears in the Statutes of 1893 it reads:

"Section 2606. All fines, forfeitures and pecuniary penalties, prescribed as a punishment, by any of the provisions of this chapter, when collected, shall be paid into the treasury of the proper county, to be added to the county general fund."

This section is identical with section 2608 of the Statutes of Oklahoma, 1890. The chapter referred to in each case is chapter 25, entitled "Crimes and Punishment."

It will thus be observed that the suit referred to in the petition as resulting in the recovery of the \$75,000, of which this \$15,000 is a part, was commenced in the district court of Garfield county on April 18, 1907, on the relation of Huett, then county attorney, and was not for the purpose of enforcing any of the provisions of said chapter entitled "Crimes and Punishment," but was for the purpose of enforcing certain provisions of the Statutes of 1893, c. 83, entitled "Trusts." It will also be observed that this suit was not authorized to be nor was it brought in the name of the county commissioners, but in the name of the territory of Oklahoma, and not to recover the fine imposed for the violation of the provisions of that chapter, but to secure

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an injunction against the unlawful discrimination denounced therein. It is clear that the board of county commissioners had no interest in that suit. On the admission of the state into the Union came the Attorney General, and on October 30, 1908, intervened in that suit and on behalf and in the name of the state set forth facts sufficient to constitute a cause of action against the defendant for the violation of the terms of another act, entitled: "An act to define a trust, monopoly, unlawful combination in restraint of trade; to provide civil and criminal penalties and punishment for violation thereof and damages thereby caused; to regulate such trusts and monopolies; to promote free competition for all classes of business in the state; and declaring an emergency," approved June 10, 1908, which authorizes him only to prosecute the suit, and which appears in Comp. Laws 1909, not in chapter 25, entitled "Crimes and Punishment," but in chapter 113, art. 1, entitled "Trusts and Combinations." Thus making it clearly to appear that when the Legislature said, as it did, in the Statutes of 1890, sec. 2608, *supra*; and again in the Statutes of 1893, sec. 2606, *supra*, and once again in that section as amended and as it appears in Comp. Laws 1909, sec. 2852, in each compilation, in chapter 25, entitled "Crimes and Punishment," in effect, that all fines prescribed as a punishment by any of the provisions of that chapter when collected shall be paid into the county treasury, it left no room for construction, but meant just what it said and had no reference to covering into said treasury any other fine imposed by any other chapter, and, under the rule of *expressio unius*, excluded this fine recovered as imposed by chapter 113 of the last compilation and entitled "Trusts and Combinations."

There is no merit in the contention that the word "chapter," as thus used, should be construed to mean "code" or "criminal statute." To show that the word "chapter" was thus used advisedly, the first two compilations of the statutes already mentioned, in chapter 25, Crimes and Punishment, art. 1, provide:

"Section 1. This act shall be known as the penal code of the territory of Oklahoma."

"Sec. 2. No act or omission shall be deemed criminal or punishable except as prescribed or authorized by this Code. The

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words 'This Code' as used in the 'Penal Code' shall be construed to mean 'Statutes of this Territory.'

The act referred to consists of 59 articles, and was carried into the compilation of 1909 unchanged except by the substitution of "State" for "Territory." Now, had the statute relied on by plaintiff read "all fines * * * prescribed by any of the provisions of this Code when collected * * *" shall go to the county, as "This Code" would mean "Statutes of this State," the term would include chapter 113 and the contention would be tenable. But the word used is "chapter" and not "code," and the intent of the Legislature, which thus weighed those words, to confine the fines payable to the county to those prescribed as a punishment by that chapter only and not so prescribed anywhere in the entire Code or "Statutes of the State," being apparent, we repeat, we believe the word "chapter" means just what it says, and we will so hold.

Neither can it be said with reason that, because none of the criminal statutes passed subsequent to those set forth in chapter 25, *supra*, entitled "Crimes and Punishment," which directs the disposition of fines as indicated, makes disposition of the fines to be recovered thereunder, such omission (if true) is indicative of the intent of the Legislature that such fines should go into the county treasury. Rather do we think that, by failing to indicate where those fines should go, the Legislature intended them to follow the course of fines at common law and be covered into the treasury of the crown. 13 Am. & Eng. Enc. Law, p. 69.

Looking at it in the large, here is a sum of money, a fine, recovered in a civil action brought by the Attorney General, not on "information in the Supreme Court," as the controlling Act of June 10, 1908, requires, but in the district court. With this suit neither the board of county commissioners nor the county attorney is given any concern by that act. Said suit is engrafted into another civil suit pending in the district court, brought by the Attorney General, "on relation of the county attorney," to enforce by injunction the terms of another and earlier act, by what is termed "a petition in interpleader supplementary." Out of this anomaly a compromise was effected, and a \$75,000 fine

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was paid in settlement by defendant to the state. Had the earlier suit succeeded, no fine could have been recovered over which to litigate. Hence it is that the fine arising on the suit of the "interpleader" is all with which we have to deal. The amount arising, as it does, from a suit brought by the law officer of the state, in the name of the state and paid in settlement to the state and which, in the absence of statute, goes to the whole people of the state, is it asking too much to require those who, in effect, claim it for a comparatively small portion of the people, to put their finger on the law which would justify such a deflection of the public moneys? This they have not done.

As the court did not err in sustaining the demurrer to the petition, the judgment is affirmed.

All the Justices concur.

BARNETT, *Guardian, et al.* v. BLACKSTONE COAL & MILLING CO.

No. 4123. Opinion Filed April 1, 1913.

COURTS — Appellate Jurisdiction — Probate Matters. Under the provisions of section 16, art. 7, and section 2 of the Schedule of the Constitution, an appeal lies to the district court from the county court, in probate matters, in those cases in which an appeal was allowed under the statutes of Oklahoma Territory.

(Syllabus by the Court.)

*Error from District Court, Muskogee County;
R. C. Allen, Judge.*

Action between T. A. Barnett, guardian, and others and the Blackstone Coal & Milling Company. From the judgment, Barnett and others bring error. Motion to dismiss overruled.

S. B. Dawes and Charles A. Cook, for plaintiffs in error.

Horace Speed, for defendant in error.

WILLIAMS, J. Section 16, art. 7 (section 201, Williams' Ann. Const. Okla.), of the Constitution of this state is as follows:

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"Until otherwise provided by law, in all cases arising under the probate jurisdiction of the county court, appeals may be taken from the judgments of the county court to the district court of the county in the same manner as is now provided by the laws of the territory of Oklahoma for appeals from the probate court to the district court, and in all cases appealed from the county court to the district court, the cause shall be tried *de novo* in the district court upon questions of both law and fact."

In *Apache State Bank v. Daniels*, 32 Okla. 121, 121 Pac. 237, paragraph one of the syllabus is as follows:

"Under the provisions of section 16, art. 7, and section 2 of the Schedule of the Constitution, an appeal lies to the district court from the county court, in probate matters, in those cases in which an appeal was allowed by the statutes of Oklahoma Territory. Wilson's Rev. & Ann. St. 1903, sec. 1793; Comp. Laws 1909, sec. 5451."

Section 5451, Comp. Laws 1909, is as follows:

"An appeal may be taken to the district court from a judgment, decree or order of the county court:

"1. Granting, or refusing, or revoking letters testamentary or of administration, or of guardianship.

"2. Admitting, or refusing to admit, a will to probate.

"3. Against or in favor of the validity of a will or revoking the probate thereof.

"4. Against or in favor of setting apart property, or making an allowance for a widow or child.

"5. Against or in favor of directing the petition, sale or conveyance of real property.

"6. Settling an account of an executor, or administrator or guardian.

"7. Refusing, allowing or directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, legacy or distributive share; or,

"8. From any other judgment, decree or order of the county court, or of the judge thereof, affecting a substantial right."

Under the eight subdivisions the district court acquired jurisdiction of the appeal from the county court, unless the appeal must be prosecuted to the Supreme Court by virtue of section 15, art. 7, of the Constitution, as contended for by the defendant in error. Sections 15 and 16 should be construed together so as to give effect to both. Under the holding in *Apache State*

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Bank v. Daniels, supra, as to the appellate jurisdiction of the district court as to probate matters, the motion to dismiss must be overruled.

All the Justices concur.

BROWN *et al.* v. FIRST NATIONAL BANK OF TEMPLE.

No. 1514. Opinion Filed January 28, 1913.

Rehearing Denied April 8, 1913.

1. **APPEAL AND ERROR—Time for Objections—Form of Verdict.** No objection having been made to the form of the verdict until the filing of the motion for a new trial, and no specification of error raising such objection having been presented in this court until on the hearing of the petition for rehearing, held, that such defect or irregularity, if any existed in the form of the verdict, was waived.
2. **PARTNERSHIP—Bills and Notes—Use of Firm Name—Liability of Corporation.** One partner cannot bind his copartner by any contract not reasonably within the scope of the partnership, unless with such copartner's knowledge and assent.

(a) Such knowledge and assent must be established by evidence affirmatively showing it, or from which it may be clearly inferred.

(b) Where one partner has subscribed the name of the firm to a note, payable to a bank, for money to be used for purposes not reasonably within the scope of the partnership, such purpose being then and there known to the officers of the bank, the other partner does not become liable as a matter of law to pay such note, to the extent of items included therein not reasonably within the scope of such partnership, by failing to express his dissent when demand of payment is made of him.

(c) The mere fact that a partner, upon being informed that his copartner has given a firm note for items including his individual debt, does not deny his liability to that extent thereon, does not *per se* amount in law to a ratification or adoption of the note for the whole debt.

(Syllabus by the Court.)

Error from District Court, Comanche County:

J. T. Johnson, Judge.

Action by the First National Bank of Temple against R. L. Brown and L. O. Montgomery, as partners. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

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T. B. Orr, Stevens & Meyers, and Shartel, Keaton & Wells,
for plaintiffs in error.

Hamon & Ellis, for defendant in error.

WILLIAMS, J. 1. This proceeding in error is to review a judgment in favor of the defendant in error, the First National Bank of Temple, wherein, as plaintiff, it sued R. L. Brown and L. O. Montgomery, as partners engaged in the ginning business. The jury returned a general verdict in favor of the plaintiff against said defendants, but without a finding against the partnership. No objection on that ground was made at the time of the returning of the verdict. In the motion for a new trial the assignment is made that the verdict is contrary to law. For the first time in the petition for rehearing is the question in any form raised in this court as to this alleged defect or irregularity in the verdict.

In *Heaton v. Schaeffer*, 34 Okla. 631, 126 Pac. 797, in an opinion by Rosser, C., the syllabus is as follows:

"In a suit against a partnership, where only one member of the firm is served, it is error to render an individual judgment against the member served. In such case judgment should be rendered against the firm, and such judgment could be enforced against the partnership property and the individual property of the member served."

The plaintiffs in error rely upon this authority for a reversal of this case.

In *Stanard v. Sampson et ux.*, 23 Okla. 13, 99 Pac. 796, the syllabus is in part as follows:

"A general verdict not having been returned, but answers to specific questions, both sides having filed and presented motions for judgment thereon, in the absence of a timely objection with proper exceptions, and the assigning of such action as error in a motion for a new trial, the same will not be reviewed here.

"When the special answers or findings were returned, the jurors each being polled *ad seriatim*, answered that the same as read by the clerk were his. No objection was made by either party, or request, that such special findings or answers should be signed, and each party filed and presented a motion for judgment in his or their favor on such special findings. *Held*, that this was a waiver of the irregularity in the foreman not signing the answers or findings as required by the statute."

In the opinion the court said :

"The plaintiff was entitled to have a general verdict returned; but, when he sat by, and permitted the general verdict to be dispensed with, and the answers to be returned into open court to the specific questions submitted, and to be recorded, without any objection, and afterwards filed a motion for judgment in his favor thereon, he cannot be permitted by such conduct to induce the court to commit an irregularity, and then speculate upon its result by seeking a judgment thereon in his favor, and be heard here on petition in error to complain, especially when there was no motion for a new trial filed and presented in the lower court seeking the correction of such alleged error. * * *

In *Wilson v. Durant*, 1 Ind Ter. 532, it is said :

"The appellants' motion in arrest of judgment was based upon the fact that the verdict of the jury, which is set forth in the foregoing statement, found 'the issues at law' in favor of the defendants. No exception was taken when the verdict was rendered, which was on March 14th, as to its form; and the court's attention was not called to it until the motion in arrest of judgment was heard, March 18th. * * * The counsel for appellants in this case insist that their clients are not in the attitude of persons who sit silently by and permit the court to commit error, but, on the contrary, they contend that, by proper motion and in apt time, they did all in their power to prevent the alleged error, and that the judgment should, therefore, be reversed. The record fails to disclose any objection to this form of verdict until four days after it had been rendered. If, at the time the verdict was rendered, counsel had called the attention of the court to the words 'issues at law,' the proper correction would doubtless have been promptly made by striking out the words 'at law,' and asking the jury whether the verdict as thus amended was their verdict. This not having been done, the trial court, having, as the judge certifies in the bill of exceptions, submitted to the jury a single and simple issue of fact, not an issue of law, might, without prejudice to the plaintiffs, treat the words 'at law' as surplusage, and enter a judgment according to the verdict viewed in this light. No error prejudicial to appellants was committed by the trial court in pursuing this course."

In the light of the foregoing authorities, it is not essential to determine whether, had the plaintiff in error at the time of the return of the verdict objected to its form and saved his exceptions thereto, the rendering of the judgment on the verdict in

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such form would constitute error prejudicial to his rights, such as to bring about a reversal of this case.

2. The court instructed the jury as follows:

"The fact that a partnership is engaged in a particular trade or business being known, is sufficient notice to third persons of the limitations, which the nature and customs of that trade or business place upon the power of each partner, and third parties dealing with a partner in matters outside the scope of its usual business, to charge the firm therein, must show him to have possessed special authority so to act.

"Therefore, if you find that the plaintiff bank, or its active managing officers, knew the kind and character of business being carried on by Brown & Montgomery, and that advances or loans by way of overdraft were made to L. O. Montgomery for the purpose of purchasing bank stock, oil mill stock, opera house stock, and furnishing money in endeavoring to secure county-seat location, were not within the scope of the business, and that amounts for said purposes were included in the overdraft and later in the note sued on, before plaintiff can recover, it must be shown that the defendant, L. O. Montgomery, was authorized to make the said loans or receive said advancement and create the indebtedness accruing therefor, or that the defendant Brown afterwards ratified the acts of L. O. Montgomery, as the term 'ratified' is hereinafter defined."

The defendant (plaintiff in error) R. L. Brown requested the court to give the following instruction:

"The mere fact that a partner, after knowledge that another partner has given a note in the name of the firm in a transaction outside the scope of the partnership business, keeps silent and does not repudiate the act, does not of itself amount in law to ratification or adoption. Ratification is in the nature of an affirmative act, which in such a case cannot be established by a mere omission to avow. The partner is not bound, as a matter of law, to deny his liability, until he is prosecuted."

This instruction was refused, and exception saved. The general charge to the jury does not substantially include or cover this instruction.

In *Reubin v. Cohen et al.*, 48 Cal. 545, it is said:

"At the instance of the plaintiff, the court below instructed the jury 'that if Sperling was informed of the fact of the giving of these notes by his co-partner, Cohen, in the name of the firm, and omitted to repudiate or disaffirm, within a reasonable

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time, what had been done by Cohen, he will be held to have ratified and adopted what he, Cohen, had done in the firm name.'

"The indebtedness for which the notes were given was the indebtedness of Cohen in the first instance, and not that of the copartnership firm of Cohen & Sperling. The instruction, assuming as it does that Sperling did not assent to the transaction at the time the note was delivered, and, of course, that he was not then bound thereby, nevertheless asserts the rule of law to be that, if he was afterward informed of the fact that the firm notes had been so given he would become bound thereby, unless he should thereupon, or within a reasonable time, 'repudiate or disaffirm' them. It may be conceded that his failure to object, under such circumstances, would be evidence tending in some degree to show assent upon his part to the giving of the notes, and so the jury were substantially told in the instruction next preceding the one we are now considering. But to say that a mere failure to actively repudiate the transaction amounts *per se* in point of law, to a ratification or adoption of the notes, is unwarranted by recognized principles defining the powers and obligations of copartners."

In *Barnard et al. v. The Lapeer and Port Huron Plank Road Co.*, 6 Mich. 274, it is said:

"No rule is better settled than that one partner cannot bind his copartner by any contract not within the immediate scope of the partnership, unless with such copartner's knowledge and consent. Each partner is an agent for all the members of the firm in the transaction of all business of such firm; but as to matters foreign to such business, he is regarded as a stranger. The general business of the firm being that of manufacturing lumber, and the ownership of land as incident thereto, the subscription to stock in a corporation, or to articles of association for the creation of one, was not an incident to such partnership. Incidental benefits would not authorize one partner to bind his fellow, and no authority so to bind him is shown.

"And the knowledge and assent required to bind the copartner must be established by evidence affirmatively showing it, or from which it may be clearly inferred. This is sought to be established from the fact that assessments were made, and their payment demanded of the firm, which were unresponded to; and it is urged that it was Barnard's duty, upon such demands, to repudiate any interest in the company, and that his silence should be construed into a recognition of his relation as a stockholder. Now, a demand, either through the mail, or personal, is sufficient to bind a stockholder, but not to create one. If the person of

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whom demand is made be not one, it is not his duty to disclaim the character of stockholder; it is enough that he does not respond to such demand. The simple admission that demand was duly made of the firm, is not one of a personal demand of Barnard, nor is of anything more than a fact—its effect being a question of law. There is no evidence, nor any admission, in the case, that knowledge of the demand ever came to Barnard; and certainly none that he ever, by any word or act, recognized any connection with the company."

See, also, to the same effect, *Mercein v. Andrus & Mack*, 10 Wend. (N. Y.) 463; *Van Dyke v. Seelye et al.*, 49 Minn. 557, 52 N. W. 215; *Johnson v. McClary et al.*, 131 Ind. 105, 30 N. E. 888.

The court having instructed the jury that before the plaintiff (defendant in error) could recover against the plaintiff in error, Brown, it must be shown that the plaintiff in error, L. O. Montgomery, "was authorized to make the said loans or receive said advancements and create the indebtedness accruing therefor, or that the defendant Brown afterwards ratified the acts of L. O. Montgomery, as the term 'ratified' is hereinafter defined," when the plaintiff in error requested the foregoing instruction as to ratification, the same should have been given. Nowhere in the general charge does said requested instruction as to ratification or adoption seem to have been substantially covered.

The defendant in error insists that the clause of the instruction:

"The mere fact that a partner, after knowledge that another partner has given a note in the name of the firm in a transaction outside the scope of the partnership business, keeps silent and does not repudiate the act, does not of itself amount in law to ratification or adoption. Ratification is in the nature of an affirmative act, which in such a case, cannot be established by a mere omission to avow,"

—is erroneous, in that such omission to avow may create an estoppel. It may be that under a proper state of facts an omission to avow the want of authority of the other partner to incur such liability might create an estoppel, where such silence caused the party to make further advancements or loans or to forego taking

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action for his protection, when such delay or inaction would prejudicially affect his rights against the other partner. But, under the record in this case, such a question of estoppel is not presented, and the question is not here determined.

As to all money loaned or advancements made to said partnership through L. O. Montgomery in due course of business, the said R. L. Brown was liable therefor, though it was afterwards diverted from said business by Montgomery, unless the bank at the time of making the loan had knowledge that it would be so diverted; and as to such terms, where there was no conflict in the evidence, the jury should have been instructed to find in favor of the plaintiff. As to items where there was a conflict in the evidence, the same should have been submitted to the jury under appropriate instructions for a finding. As to the advancements that were made for matters outside of the scope of the partnership, with the knowledge of the bank that it was not to be used within such scope of said partnership, as to whether or not a ratification was made by the plaintiff in error, the same should also have been submitted under proper instructions. If, with the money that was advanced by the bank, with the knowledge that it was to be used to buy oil mill stock and bank stock, such stock was bought and issued in the name of the partnership or firm and the evidence showed that the plaintiff in error knowingly accepted the fruits of such transaction, these were matters that the jury should take into consideration in determining the ratification or liability on his part. Did he accept the fruits of said stock, or did he repudiate the purchase of the same and the holding of the same in the partnership name when the knowledge came to him? If he did the latter, he did not become owner thereof, and the partnership would have held the title as trustee for the other partner.

The letter of June 26, 1908, to J. C. Tandy, Temple, Oklahoma, who appears to have been vice-president of the defendant in error bank, should have been admitted in evidence. In that letter the plaintiff in error says:

"He (plaintiff in error, L. O. Momtgomery) has done everything against my advice and, of course, he sees his error now. This fall I will have a bookkeeper that I can depend on to give

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me a detail statement of the business every week. We are in the gin business and not in the seed cotton business, nor any other kind that I know of, and when it comes to losing money it is not me.

"I went into the gin business only with him and he had no right to use the company otherwise. Mr. Tandy, you will have to help look after Lee, for I know he is a good man for your bank."

It was competent for the purpose of determining whether or not the plaintiff in error, Brown, ratified the act of L. O. Montgomery in borrowing money from the defendant in error bank to be used out of the scope of said partnership business.

It follows that the judgment of the lower court must be reversed, and the cause remanded, with instructions to grant a new trial and proceed in accordance with this opinion.

All the Justices concur.

In re BOARD OF EDUCATION OF THE CITY OF PERRY.

No. 2153. Opinion Filed April 12, 1913.

(130 Pac. 951.)

1. **JUDGMENT — Validity — Persons Concluded — Judgments Against School Boards.** The owner of several judgments against a board of education is not concluded by a judgment against their validity in a suit by the board against its treasurer to mandamus him to pay certain judgments, in which said suit the dormancy of the judgments sought to be concluded was directly involved, although the owner of said judgments employed counsel in that suit and urged their validity and assumed the conduct of and actually engaged in said suit.
2. **LIMITATION OF ACTIONS — Agreement to Waive — Estoppel.** Where public property of a board of education cannot be seized on execution, and the board enters into a valid agreement with judgment creditors to apply the judgment fund to judgments in order of entry and complies therewith, it cannot, after the expiration of the statutory period when a judgment becomes dormant for failure to issue execution, plead the statute of limitations as a bar to those judgments not yet reached for payment under the agreement. The board of education is estopped both on the contract and on the ground of equitable estoppel.

(Syllabus by the Court.)

In re Board of Education of the City of Perry.

*Error from District Court, Noble County;
W. M. Bowles, Judge.*

Proceeding by the board of education of the city of Perry for issuance of funding bonds. From the judgment, certain judgment creditors bring error. Reversed and remanded.

Devereux & Hildreth and Dale, Bierer & Hegler, for the board of education.

H. E. St. Clair and H. A. Johnson, for the judgment creditors.

TURNER, J. On June 8, 1910, "the board of education of the city of Perry of the state of Oklahoma," a corporation, commenced proceedings in the district court of Noble county the object of which was to fund certain judgments outstanding against the board by an issue of negotiable coupon bonds pursuant to section 25 of the Schedule to the Constitution and an act entitled "An act to enable counties, municipal corporations and boards of education of any city or school district to refund their indebtedness, approved March 11, 1905." The petition set forth a list of its outstanding judgment indebtedness accrued prior to November 16, 1907, marked "Exhibit A," which is admitted to be valid. Also a list of judgments, marked "Exhibit B," rendered and entered against the board prior to that time, which it alleged were dormant and constituted no part of the judgment indebtedness of the board, for the reason that the same had been rendered and entered more than six years prior to said date and had not been revived, and for the further reason that no process had issued to enforce the payment of the same. The petition, among other things, sought to have the validity of said judgment indebtedness determined, and alleged that an arrangement had been made with all valid judgment holders for funding the same at par and accrued interest with the funding bonds of the school district; that by prior resolution of said board said bonds had been duly authorized and directed to issue upon the adjudication and approval of the court; that the form of bonds and interest coupons had been prescribed, and due provision made for the

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necessary tax to pay said interest when due and to provide a sinking fund to pay said bonds at maturity; and prayed that the amount of the valid judgment indebtedness outstanding against said board be determined by the court and that the board be ordered to issue, etc.

Thereafter came J. B. Beadles, L. N. Beadles, partners as J. B. Beadles & Sons, and, in effect, alleged themselves to be the owners and assignees of sixteen of the 26 judgments set forth in "Exhibit B," and by answer put in issue the validity of said judgments, and alleged that for certain reasons the board was estopped to assert their dormancy. Like answers were filed by the owners of the remaining judgments set forth in said exhibit. After reply, in effect, that said Beadles were estopped to assert the validity of said judgments, and that the other judgments were barred by the statute of limitations, there was trial to the court and judgment for the board declaring said judgments and each of them "void and dormant and no legal indebtedness against said board." The Beadles alone bring the case here.

The sole question involved is the dormancy of their judgments. The record discloses that, being pressed by judgment creditors, the board met July 14, 1899, when, as shown by its minutes:

"The matter of paying off judgments *pro rata* and bonding was referred to finance committee and they to confer with Attorney Quick and report at next meeting."

On June 4, 1900, it was:

"Moved that Treasurer Todd is hereby requested to pay out money *pro rata*—money now held by him—*pro rata*, on judgments against the district. Motion received no second. On motion the matter was referred to finance committee and Attorney Quick."

On July 6, 1900:

"On motion Treasurer Todd was requested to hold the money now in his hands belonging to the district as a judgment fund until further directed by the board. On motion the attorney for the board was instructed to defend all cases where there is any doubt as to the legality of their claim."

And on November 5, 1900:

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"Letter read by secretary from R. J. Edwards, of Oklahoma City, this territory, regarding the payment of judgment against this district in order of their rendition. Said Edwards writes both as an attorney and as holder of about fifteen thousand dollars of the judgment against the board. Mr. Beadles holding five or six thousand dollars represents with him about four-fifths of the judgment indebtedness. They agree upon the plan. Plan proposed by letter discussed. It being perfectly fair and reasonable, it was moved and seconded that this board acquaint Mr. Todd, treasurer of this school district, with their desire to proceed after the plan already mentioned, namely, paying judgment indebtedness in the order of their rendition, as the only practical way to wipe out the total debt in the near future. Motion carried."

Thereafter Mr. Todd write thus:

"To the judgment creditors of the school district 52, board of education of the city of Perry, Oklahoma.

"I, as treasurer, through the advice and consent of the board of education, have formulated the following plan to liquidate the judgment indebtedness of said school district:

"All creditors who are conversant with the facts know that on October 3, 1894, the school district bonded for \$18,000 having at that time a floating warrant indebtedness of \$10,000, making a total indebtedness of \$28,000, the limit of indebtedness that could be legally contracted under the United States statutes, limiting the amount of debt which municipal corporations can create to four per cent. of the assessed valuation. The assessed value at that time being in round numbers \$700,000, four per cent. making a possible legal indebtedness of \$28,000. Shortly after this debt was created it was decided that lots in the city of Perry not deeded by the townsite board to the individuals were not subject to taxation, this item with the subsequent depreciation of the value of city property, reduced the valuation to below \$400,000, which has since steadily increased until now we have a valuation approximately \$450,000. In the meantime school buildings have been erected costing far in excess of the amount raised by bonds, buildings more expensive than the original estimates. This with a yearly deficit of funds in the early days to meet the current expense run up a warrant indebtedness of \$29,000 of this amount about \$19,000 has been put into judgments. At this point the school board thought it advisable to allow no more judgments, hence informed the warrant holders that in the future the 4 per cent. limit would be pleaded and no judgments have been

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taken for about one year. Eighteen months ago a peremptory mandamus was asked by one judgment creditor in the Supreme Court, requesting an order (2) to compel a levy to be made sufficient to pay judgments, which was refused by the Supreme Court of the territory. In consideration of all these facts we are placed in the position, as public servants, to decide between standing on the technical legal rights and refusing payment in total or recognizing our moral obligations to pay the debt. Public sentiment is divided with a predominant disposition to finally pay out if it can be done without oppressing the taxpayer. It is a controverted legal point as to whether payment on the judgments shall be made in order of rendition or *pro rata* and no party at interest has ever been willing to take the initiatory steps to determine the issue. The payment *pro rata* involves an endless complication of court records in entering the *pro rata* payments which under the present laws and valuations could not exceed six or seven per cent. per annum, not as much annually as the accruing interest, many of the judgments are small. In view of these facts, we have thought that if a written waiver of the right (if such right exists) of each judgment creditor who may be affected to payment *pro rata* be signed by each creditor, we might then see our way clear to finally liquidate the whole judgment indebtedness; and if such waiver be signed by each creditor, we as a board pledge our official and personal influence to carry out the above plan and ask that the enclosed waiver be signed and mailed to us by return mail.

“GEO. TODD.”

To which each judgment creditor, save one, responded by signing said waiver, which reads:

“I, the undersigned judgment creditor, holding judgment of record against the board of education of the city of Perry, Noble county, Oklahoma Territory, hereby ask that the school treasurer pay all judgments against the board of education of the city of Perry, in order of rendition, hereby waiving right (if such right exists) to payment *pro rata* and this waiver shall apply to grantees and assigns; said judgment was rendered ———, 18——, for the sum of ——— dollars.”

The record further discloses that pursuant to this arrangement, which was made with all judgment holders save one, the board of education paid all judgments in the order of their rendition down to judgment number 29, belonging to J. B. Beadles,

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after which, in the fall of 1905, it stopped payment and refused to pay any more, including the judgments in question.

It is insisted by the board, as to the sixteen judgments set forth in "Exhibit B" as belonging to said Beadles, that they are estopped to assert their validity by reason of the record in the case of *Wenner v. Board of Education of the City of Perry*, 25 Okla. 515, 106 Pac. 821. As these sixteen judgments are conceded to be the same judgments passed on in that case, where they were held to be dormant and to constitute no valid indebtedness against the district, it seems that the point is well taken—that is, if the Beadles are bound by the judgment in that case, and if all that was there decided, or might have been, is *res judicata* as to them. That was a suit in mandamus brought by said board against Charles L. Wenner, treasurer of the board, to compel him to pay these and other judgments out of a judgment fund in his hands. The question was, as here, whether these judgments were dormant because of section 4625, Wilson's Rev. & Ann. St. 1903 (Comp. Laws 1909, sec. 5669), which reads:

"If execution shall not be sued out within five years from the date of any judgment that now is or may hereafter be rendered, in any court of record in this territory, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor."

And that, too, notwithstanding section 6169, Wilson's Rev. & Ann. St. 1903 (Comp. Laws 1909, sec. 8120), which reads:

"Whenever any final judgment shall be obtained against any school district, the district board shall levy a tax on all taxable property in the district for the payment thereof; such taxes shall be collected as other school district taxes, but no execution shall issue on such judgment against the school district; and in case the district board neglect to levy a tax as aforesaid, for the space of thirty days after such judgment shall become final, or in case the proper officer shall neglect to collect the tax levied within the time and in the manner provided by law, then the judgment creditor of the district may have and recover a judgment against the officer or officers or his or their sureties, so in default, for the

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amount due him on such judgment against the district, with costs, upon which execution shall issue."

And such they were held to be by the court, which in the syllabus said:

"Section 437, art. 20, c. 66 (section 4635), Wilson's Rev. & Ann. St. 1903, providing that a judgment shall become dormant if execution be not sued out thereon within five years is applicable to judgment against school districts notwithstanding section 68, art. 3, c. 77 (section 6196), same statutes, provided that the district board shall levy a tax for the payment thereof, and no execution shall issue thereon; this for the purpose that a writ of mandamus to enforce payment in such case is the legal equivalent to the statutory writ of execution."

Whether this opinion is right or wrong we need not say, as nothing there decided is *res judicata* as to the Beadles, for the reason that they were not parties or privies to that suit, and hence are not bound thereby, although it appears that they employed counsel to there urge the validity of these same judgments and assumed the conduct of and actively engaged in said suit.

In *Lovejoy v. Murray*, 3 Wall. 1, the court, quoting from Greenleaf on Evidence, secs. 522-3, said:

"'Justice requires,' he says, 'that every cause be once fairly and impartially tried; but the public tranquility demands that, having been once so tried, all litigation of that question, and between the same parties, should be closed forever. It is also a most obvious principle of justice, that no man ought to be bound by proceedings to which he is a stranger, but the converse of this rule is equally true, that by proceeding to which he was not a stranger, he may well be bound. Under the term parties, in this connection, the law includes all who are directly interested in the subject-matter, and had a right to make defense, or to control the proceedings, and to appeal from the judgment. This right involves, also, the right to adduce testimony, and to cross-examine the witnesses adduced on the other side. Persons not having these rights are strangers to the cause. But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties, and claim under them, or in privity with them, are equally concluded by the same proceedings.' 'The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party is, that they are identified

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with him in interest; and whenever this identity is found to exist, all are alike concluded.' ”

Litchfield v. Goodnow, 123 U. S. 549, was a suit to recover taxes paid under the circumstances set forth in *Striker v. Goodnow*, at page 527, of the same volume. The suit was brought by Goodnow, assignee of the Iowa Homestead Company, in his lifetime, against Mrs. Litchfield in her lifetime, to recover the amount of certain taxes for certain years paid by said company on certain lands on the Des Moines river owned by her by and through conveyances from another company. As a defense to the action, the prior adjudication in a certain case was pleaded in bar; but the court said:

“The defense of prior adjudication is disposed of by the fact that Mrs. Litchfield was not a party to the suit in which the adjudication relied on was had. At the time of the commencement of the suit she was the owner of her lands, and they were described in the bill, but neither she nor anyone who represented her title was named as a defendant. She interested herself in securing a favorable decision of the question involved as far as they were applicable to her own interests, and paid part of the expense; but there was nothing to bind her by the decision. If it had been adverse to her interest, no decree could have been entered against her personally either for the lands or the taxes. Her lands were entirely separate and distinct from those of the actual parties. A decree in favor of or against them and their title was in no legal sense a decree in favor of or against her. She was indirectly interested in the result, but not directly. As the questions affecting her own title and her own liability for taxes were similar to those involved in the suit, the decision could be used as a judicial precedent in a proceeding against her, but not as a judgment binding on her and conclusive as to her rights. Her rights were similar to, but not identical with, those of the persons who were actually parties to the litigation.

“Greenleaf, in his treatise on the Law of Evidence, vol. 1, sec. 523, states the rule applicable to this class thus: ‘Under the term *parties*, in this connection, the law includes all who are directly interested in the subject-matter, and had a right to make defense, or to control the proceedings, and to appeal from the judgment. This right involves also the right to adduce testimony, and to cross-examine the witnesses adduced on the other side. Persons not having these rights are regarded as *strangers* to the cause. But to give full effect to the principle by which

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parties are held bound by a judgment, all persons who are represented by the parties and claim under them, or in privity with them, are equally concluded by the same proceedings. We have already seen that the term privity denotes mutual or successive relationship to the same rights of property. The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party is, that they are identified with him in interest; and whenever this identity is found to exist, all are alike concluded. Hence, all privies, whether in estate, in blood or in law, are estopped from litigating that which is conclusive on him with whom they are in privity.' The correctness of this statement has been often affirmed by this court: *Lovejoy v. Murray*, 3 Wall. 1, 19; *Robbins v. Chicago City*, 4 Wall. 657, 673; and the principle has been recognized in many cases. Indeed, it is elementary. *Hale v. Finch*, 104 U. S. 14, 22; *Butterfield v. Smith*, 101 U. S. 570.

"In the condition of parties to the record during the whole course of the litigation between the Homestead Company and those who were named as defendants, Mrs. Litchfield had no right to make a defense in her own name, neither could she control the proceedings, nor appeal from the decree. She could not in her own right adduce testimony or cross-examine witnesses. Neither was she identified in interest with anyone who was a party. She owned her lands; the parties to the suit owned theirs; her rights were all separate and distinct from the rest, and there was no mutual or successive relationship between her and the other owners. She was neither a party to the suit, nor in privity with those who were parties; consequently she was in law a stranger to the proceeding and in no way bound thereby. As she was not bound, the Homestead Company and its assigns were not. Estoppels, to be good, must be mutual."

—and affirmed the judgment of the trial court.

State ex rel. Kane v. Johnson, Comptroller, 123 Mo. 43, 25 S. W. 855, was a suit by relator, as chief of the city fire department, to mandamus respondent, the comptroller of the city, to countersign his salary warrant drawn upon the city treasurer. Among other defenses interposed, was a judgment in a suit by a taxpayer to restrain payment of the salary, in which Kane was not a party, though he employed counsel to defend the suit. In that suit Gilmer, the auditor of the city, as well as respondent, were defendants, who by the judgment and decree rendered and entered were perpetually enjoined and restrained from ever sign-

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ing or countersigning any warrant of similar character. The court said:

"Is he estopped by the suit of Ransom against respondent and Gilmer? The rule on this subject is that a matter once adjudicated by a court of competent jurisdiction may be invoked as an estoppel in any collateral suit, in any court of law or equity, or in admiralty, when the same parties or their personal representatives, or one of the parties and the privy or privies of the other, allege anything contradictory to it; and 'those who assume a right to control or actively participate in the trial or its management, though not formal parties, will be concluded.' *Henry v. Woods*, 77 Mo. 277; *Stoddard v. Thompson*, 31 Iowa, 89; *Strong v. Insurance Co.*, 62 Mo. 289; *Wood v. Esnell*, 63 Mo. 193; *Landis v. Hamilton*, 77 Mo. 554; *Conger v. Chilcote*, 42 Iowa, 18. In order to make an estoppel, however, the action must be between the same parties as the former suit or their privies. Parties are understood to be 'all persons having the right to control the proceedings, to make defense, to adduce or examine witnesses, and to appeal from the decision, if an appeal lies.' 1 Greenl. Ev. sec. 535. 'Personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors or purchasers from them with notice of facts,' are privies. *Id.*, sec. 189. The relator was not a party to the suit by Ransom against the respondent and Gilmer, nor could he have appealed from the judgment rendered therein. The mere fact that he employed attorneys to defend that suit, who participated in its trials and the examination of witnesses, ought not to estop him from now asserting his rights, as he claims nothing by, through, or under them. While relator might have become a party defendant to that suit had he felt so inclined, he was under no obligations to do so. If the purpose of the suit was to pass upon his rights, he should have been made a party. *Hope v. Mayor, etc.*, 72 Ga. 246. *Samis v. King*, 40 Conn. 298, was a suit by injunction to restrain the payment of salary to policemen not legally appointed, brought against the clerk, auditor, and treasurer of the city, but the city itself was not made a party defendant; and it was held that it was not enough that the city assumed the defense of the case through its attorney; that the city was a necessary party; and that, so long as it did not appear upon the record, no decree could be passed against it."

We are therefore of opinion that there is nothing in the Wenner case to estop the plaintiff in this. Adhering, then, to the Wenner case, in which we held that these judgments would other-

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wise be dormant, on account of the bar of the statute, but for the arrangement, *supra*, between the board and the owners thereof, relied on in support of the Beadles' plea of estoppel, can it be said in view of this arrangement, whereby these judgment creditors were induced to forego the right to enforce their collection by taking such steps as the law permitted, that the board has any right thereunder or in equity and good conscience to successfully interpose the bar of the statute invoked in that case? We say no. Rather will we hold that said arrangement is nothing less, in effect, than a contract between the parties in interest to stay proceedings pending their payment, and of itself and in equity and good conscience is sufficient to preclude the board from asserting the bar of the statute. That the effect of this, or a similar arrangement pleaded under like circumstances, was to work an estoppel against a municipality was held by the Supreme Court of the United States in *Beadles v. Smyser, Mayor, etc.*, 209 U. S. 393, on error to the Supreme Court of Oklahoma Territory, reported in 17 Okla. 162, which was followed in the Wenner case, which followed *Beadles v. Fry*, 15 Okla. 428. In reversing *Beadles v. Smyser, Mayor, etc.*, 17 Okla. 162, the court said:

"Accepting the decision of the Supreme Court of Oklahoma, rendered in 15 Oklahoma, *supra*, construing the statute so as to permit the issuance of execution against the municipality, with the right to levy upon the private property of the corporation if it has any, could the city take advantage of the failure to issue execution under the circumstances shown in this case? * * * That the principles of right and justice, upon which the doctrine of estoppel *in pais* rests, are applicable to municipal corporations, is recognized by textwriters and in well-considered cases. In 1 Dillon on Municipal Corporations (4th Ed.), in a note to section 417, that learned author says: 'Any positive acts (*infra vires*) by municipal officers which may have induced the action of the adverse party, and where it would be inequitable to permit the corporation to stultify itself, by retracting what its officer had done, will work an estoppel.' And this case does not rest on the ground of equitable estoppel alone. The manner of liquidation of these judgments was the subject of express contract between the parties. In the present case, by the action of the city council, the judgment creditors were so placed that during the

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time, at least while the city council were carrying out the arrangement of December 3, 1901, in good faith, they could not consistently, with fair dealing and the terms of the contract on their part, issue an execution to seize the property of the municipality; had they undertaken to do so, a court of equity would have promptly restrained such proceedings. It is averred, and not denied, that up until the year 1905 the city council made a levy each year for the largest amount which the statute permitted, to create a judgment fund out of which to pay, and out of which was regularly paid, the outstanding judgments against the city, and that these payments continued until the plaintiff's judgments were reached, which were next in order. While thus acting to the limit to which the law permitted, and in good faith carrying out the arrangement between the parties, it is perfectly apparent that the plaintiff was not in a position to seize by execution any property of the municipality. * * * As we said, the principles of natural justice and fair dealing are alike applicable to municipal corporations as to individuals, and to permit the city to escape the payment of judgments, whose validity is not otherwise questioned, for failure to issue execution or sue out a writ of mandamus during the time when the action of the city officers was such as to prevent the exercise of the right, would be to permit the action of the representatives of the city, who have had the benefit of the contract during the time both parties were observing its obligations, to work a gross injustice upon the creditors holding valid judgments against the municipality * * * It is not argued at the bar in this case that the arrangement with the judgment creditors was void for want of power in the municipality to make the arrangement of December, 1901, and we fail to see any valid reason why the municipality might not enter into this arrangement. It was permitted by law to make an annual levy of five mills on the dollar. 1 Wilson's Statutes, 1903, sec. 466. If the judgment creditors and the municipality saw fit to make an arrangement by which the amount of this annual levy might be distributed by the consent of the creditors among them in accordance with the priority of their judgments, we perceive no reason why this may not be legally done. The effect of this arrangement was to prevent the judgment creditor from taking such steps as the law permitted to collect his judgment, and, upon principles of common right and justice, it would not do to permit the city to carry out such an arrangement during nearly all the five-years' period, and then meet its obligation by a plea of the statute of limitations upon the ground that the judgments had become dormant, while both parties were recognizing their

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binding obligation and doing all that the law permitted, to effect their satisfaction, and had entered into a contract which prevented the judgment creditors from taking steps to avail themselves of their right to collect their judgments by execution or by writ of mandamus."

We are therefore of opinion that the board is estopped to assert the bar of the statute and the consequent dormancy of the judgments set forth in "Exhibit B" as belonging to the Beadles, whether acquired before or *pendente lite*; that the same constitute valid and subsisting outstanding indebtedness against the board, and should be funded in the same manner as those set forth in "Exhibit A," and that this cause should be reversed and remanded, to be proceeded with according to this opinion. It is so ordered.

HAYES, C. J., and KANE and DUNN, JJ., concur; WILLIAMS, J., absent, and not participating.

STATE BAR COMMISSION *ex rel.* WILLIAMS v.
SULLIVAN.

No. 3506. Opinion Filed July 23, 1912.

On Application for Rehearing, November 22, 1912.

Publication Withheld Until March 31, 1913.

(131 Pac. 703.)

1. **ATTORNEY AND CLIENT—Disbarment—Verification of Charges.** In disbarment proceedings instituted by the State Bar Commission by the order and direction of the Supreme Court, no verification of the specification of charges is necessary, under section 267, Comp. Laws 1909.
2. **SAME—Determination of Sufficiency.** The sufficiency of the verification must be determined by an inspection of it, and the evidence of affiant cannot be taken for the purpose of showing that he had no personal knowledge as to the charges.
3. **CONSTITUTIONAL LAW—Jury—Right to Practice Law—Vested Right—Jury Trial.** The right to practice law is not a vested right, but a mere privilege, and an action to disbar an attorney under section 267, Comp. Laws 1909, is a civil proceeding, and the accused is not entitled to a trial by a jury as a matter of right.
4. **ATTORNEY AND CLIENT—Disbarment—Grounds—Attack on Court.** The obligation which attorneys assume when they are ad-

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mitted to the bar is not simply to be obedient to the Constitution and laws, but to maintain at all times the respect due the courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but includes abstaining, out of court, from insulting language and offensive conduct toward the judges personally for their judicial acts. An attorney may criticise the courts so long as his criticisms are made in good faith and in respectful language, but the printing and publication of a pamphlet falsely, purposely, and maliciously attacking the integrity of the courts and the judges thereof, designed to willfully, purposely and maliciously misrepresent the courts and the judges thereof and bring them into disrepute and lessen the respect due them, violates his duties and obligations as an attorney and counselor at law, for which he may be disbarred.

5. **SAME—Pleading as Evidence.** Under section 266, Comp. Laws 1909, an attorney cannot be suspended or disbarred for the filing of any pleading or exhibit in the courts of this state, but a petition, with a pamphlet attached thereto as an exhibit, falsely and maliciously attacking the courts of this state and the judges thereof, may be considered as evidence upon the question of the attorney's moral and mental fitness to practice law.
6. **SAME—Jurisdiction.** The Supreme Court, having exclusive jurisdiction to admit attorneys to practice law, has, independent of statutory authority, the inherent power to disbar attorneys for misconduct.

(Syllabus by the Court.)

Burford and Hubbell, Special Judges, dissenting.

Original proceeding by the Bar Commission of the State of Oklahoma, on the relation of Ben F. Williams, for the disbarment of P. M. Sullivan. Defendant disbarred, and application for rehearing overruled.

C. W. Stringer, for plaintiff.

James Twyford, for defendant.

DUDLEY, SPECIAL JUDGE. This is an original proceeding in this court by the State Bar Commission, on the relation of Ben F. Williams, against P. M. Sullivan, a member of the bar of this court and the inferior courts of the state, residing at Oklahoma City. The regular judges of the Supreme Court were disqualified, and this fact was certified by them to the Governor of the state, who thereupon appointed five special justices of the Supreme Court to hear and determine this cause, who there-

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after assembled at Oklahoma City and qualified as such, and heard the testimony in this case. Before proceeding to a discussion of the merits of the case, it becomes necessary to determine some preliminary questions raised and urged by counsel for defendant.

The specification of charges was filed January 13, 1912. The defendant was duly notified of the filing of the charges and furnished with a copy thereof, and in due course of time filed an answer to and an explanation of the charges and specification filed against him, to which the plaintiff filed a reply, by way of general denial. Upon the hearing of the cause, the defendant objected to the introduction of any evidence upon the part of the plaintiff in support of the specification of charges, for the reason that the petition or specification of charges was not verified, as required by law, in that it was verified upon information and belief and not positively; and thereupon C. W. Stringer, the attorney for the plaintiff and the person who verified the specification of charges upon information and belief, asked leave of court to amend the verification of charges by making the verification positive. Leave was granted to do so and the amendment was made, and after the conclusion of the taking of testimony upon the part of the plaintiff the defendant again challenged the sufficiency of the verification of the specification of charges, for the reason that the testimony clearly showed that Mr. Stringer had no personal knowledge of the allegations contained in the specification of charges, and that by reason thereof the court did not have jurisdiction. The position of counsel for defendant is not well taken, for two reasons: (1) This proceeding was commenced by the Bar Commission of the State of Oklahoma, by the order and direction of this court, and therefore, under section 267, p. 229, Comp. Laws 1909, it was not necessary for the specification of charges to be verified at all; and (2), even though it were necessary for the specification of charges to be verified, after the amendment was made as to the verification, it was then a positive verification and its sufficiency must be determined by an inspection of the verification itself; and, even though it developed upon the hearing of the case (a point which

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we do not concede) that the person who made the verification did not have actual knowledge of the statements contained therein, this fact cannot be taken for the purpose of showing that he had no personal knowledge. *In re Collins*, 147 Cal. 8, 81 Pac. 221.

It was also contended by the defendant that his right to practice law in the courts of this state was a vested right, and that therefore as a matter of right he was entitled to a trial by a jury in this court, upon the charges preferred against him, under chapter 56, p. 97, of the Session Laws of 1910, providing for trial by jury in this court. To this contention of the defendant we cannot agree. The right to practice law is not a vested right, but a mere privilege. 4 Cyc. p. 898, and cases cited; *State ex rel. Mackintosh, Pros. Atty., v. Rossman*, 53 Wash. 1, 101 Pac. 357, 21 L. R. A. (N. S.) 821, 17 Ann. Cas. 625. Section 268, p. 229, Comp. Laws 1909, on the subject of "Trial in Disbarment Proceedings," specifically provides that the issues joined shall in all cases be tried by the court. This is a specific statute covering this class of proceedings, and should govern over the general statute. Section 1, c. 56, p. 97, of the Session Laws of 1910, provides:

"That in any cause now pending or hereafter brought in the Supreme Court wherein said court is exercising its original jurisdiction in which an issue of fact is presented properly triable by a jury, and either party to said cause demands a jury trial, said court shall not dismiss such cause for the reason that a jury is required, but shall proceed in the manner hereinafter prescribed."

The issue of fact presented here is not properly triable by a jury, for the reason that the special statute governing the trial of proceedings of this kind specifically provides that all questions of fact shall be tried by the court. The provision of the Constitution as to the right of a trial by a jury means the right of trial by jury as it existed at the time of the adoption of the Constitution. Williams' Ann. Const., sec. 27, p. 15; *State v. Cobb*, 24 Okla. 662, 104 Pac. 361, 24 L. R. A. (N. S.) 639; *Baker v. Newton*, 27 Okla. 438, 113 Pac. 1034. A disbarment proceeding, under our statute, is a civil proceeding (*In re Biggers*, 24 Okla. 842, 104 Pac. 1083), and the right to a trial by a jury in a disbarment proceeding did not exist at the time of the adoption of

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the Constitution (*Dean v. Stone*, 2 Okla. 13, 35 Pac. 578). We therefore are clearly of the opinion that the defendant was not as a matter of law entitled to a trial by jury, and his application was denied.

This disposes of all preliminary questions raised and urged by the defendant, and we now proceed to a discussion of the merits of the case.

It is alleged in substance in paragraph 2 of the specification of charges that the defendant is not a fit and proper person to engage in the practice of law in this state and should be disbarred, for the reason that he has been guilty of gross misconduct and has violated his oath and duty as an attorney and counselor at law. This paragraph is subdivided into five specific charges. However, we only deem it necessary to consider two of them, namely, the second and fifth, and we will therefore discuss them in their order. In the second subdivision of this general charge it is alleged that the defendant has been guilty of gross misconduct and violated his duty and obligations as an attorney and counselor at law, in that he, within a year prior to the filing of the specification of charges in this court, falsely, maliciously, and without reasonable justification or excuse caused to be printed and published a certain book or pamphlet entitled "A Criminal Combine," consisting of the Governor, the Attorney General, the Supreme Court, district courts, district clerks, district attorneys, referees, perjurers, murder plotters, and crooks galore in the state of Oklahoma; that said book or pamphlet was printed and published by the defendant for the purpose of giving vent and expression to his own personal spleen and malice, and to excite and create an ill will and prejudice against the courts of this state and the judges thereof, and the other officers and attorneys mentioned in said publication.

The defendant in his answer admitted the printing and publication of the pamphlet, but claims that the publication was in good faith and without malicious motives, and that the statements and allegations therein contained are true; he denies, however, that the pamphlet was printed and published at any time within one year prior to the filing of the specification of charges herein, and claims

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that, if he did violate any of his duties and obligations as an attorney and counselor at law, he cannot be disbarred on account thereof, for the reason that the same is barred by the statute of limitations.

In the fifth subdivision of the specification of charges it is alleged that the defendant has been guilty of misconduct and violated his duties and obligations as an attorney and counselor at law by preparing and filing in the district court of Oklahoma county, Okla., a certain document styled a "Petition," in case No. 11,054, wherein he is plaintiff and the Watch Tower Bible Tract Society and others, including the district, superior, and county judges of Oklahoma county, the district judge of Cleveland county, the judges of the Supreme Court, C. N. Haskell, Governor, and Chas. West, Attorney General, are defendants, in which he charges these defendants and others mentioned therein with a conspiracy to judicially rob him of certain real estate in Oklahoma City, and in connection with this general charge of conspiracy he charges them with robbery, bribery, perjury, and numerous other offenses; that the preparation and filing of said pleading was not actuated by an honest purpose to present and state in said petition any issuable or triable matters of fact or law, but was prepared and filed maliciously and for the purpose upon his part to slander and libel said defendants and bring the courts of this state, and the judges thereof, and the other officers mentioned therein, into contempt, ridicule, hatred, and malice, and to injure the defendants in their reputations as citizens and public officials. Defendant in his answer admits that he prepared and filed said petition, but claims that the statements and allegations therein contained are true; that he filed the action for the purpose of recovering the lands which he had lost by reason of the acts and conduct of the defendants, as therein stated; and that the filing of said petition was no misconduct upon his part, nor a violation of any of his duties and obligations as an attorney and counselor at law, and, even if it were, he cannot be suspended or disbarred on account thereof under the statutes of this state.

We think the statements and allegations of the second and fifth subdivisions of paragraph 2 of the specification of charges

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are sustained by the testimony, and it therefore becomes pertinent to determine whether or not the conduct upon the part of the defendant, as set out in these two subdivisions, justifies his suspension or disbarment under the statutes of this state. Section 266, p. 228, Comp. Laws 1909, enumerates three causes for which an attorney may be suspended or disbarred. The one applicable, if at all, to the facts in this case, is subdivision 3, which is, "For the willful violation of any of the duties of an attorney or counselor." Section 257, p. 227, Comp. Laws 1909, defines the duties of attorneys. The part of the statute applicable to the case at bar is: "Not to encourage either the commencement or continuance of an action or proceeding upon any motive of passion or interest." Section 255, p. 226, Comp. Laws 1909, prescribes the oath that attorneys and counselors at law of this state shall take in open court. The part of the oath applicable to this case is:

"You shall not wittingly, willingly or knowingly promote, sue or procure to be sued, any false or unlawful suit, or give aid or consent to the same; you shall delay no man for lucre or malice, but shall act in the office of attorney in this court according to your best learning and discretion, with all good fidelity as well to the court as to your client."

These are all of the sections of our statute that in any way apply to the facts and circumstances of this case; and, if the conduct of the defendant does not come within these provisions, then there is no statutory authority for his suspension or disbarment upon the charges brought against him.

The pamphlet or book referred to is a 36-page document, with defendant's picture on the front page. A mere casual reading of this pamphlet by one familiar with the judicial history of this state will convince him that it is a false, malicious, and unwarranted attack upon the courts and the judges thereof mentioned and referred to in the publication. It bristles with malice and hatred from start to finish, and was published for the purpose of creating an ill will and prejudice against the Supreme Court, the inferior courts, and the judges thereof mentioned therein. The pamphlet gives a detailed history of the proceedings instituted by defendant in the district court of Oklahoma county to recover a certain piece of valuable real estate located in Ok-

lahoma City. The case, or some phase of it, has been before three or four district judges and as many special judges and referees, the superior and county judges of Oklahoma county, and the regular district judge and special judge, W. J. Jackson, of the district court of Cleveland county, and finally reached the Supreme Court, where the judgment of the district court of Cleveland county, was reversed and a new trial granted. The publication charges every judge, special or regular, and the referees to whom said cause, or some phase thereof, has been referred, with a conspiracy to judicially rob the defendant of the piece of land in Oklahoma City, and in furtherance of this general conspiracy he charges them with bribery, perjury, and other crimes and misdemeanors too numerous to mention. Finally, after the case got into the Supreme Court, even though he secured a reversal, he takes exception to the action of the Supreme Court because they did not render a judgment in his favor on the merits of the case, and then proceeds to accuse them with bribery, forgery, perjury, and other serious charges. The publication, upon its face, is conclusive of the falseness and maliciousness of the statements therein contained. It would take too much space to refer to the various charges contained in this pamphlet, but the following paragraph from what is styled the "Introductory" in the publication is a fair index to the contents thereof:

"And I know from a bitter, boycotted, persecuted experience that not only the Supreme Court, but the Governor (C. N. Haskell), the Attorney General, four district judges, two district clerks, three county attorneys, and other county and state officials of Oklahoma, are impure and guilty of many high crimes and misdemeanors in office for which they can and should be driven from power to prison."

Upon the trial of the case the defendant offered no apology for the publication of the document, but asserted that the statements therein contained were true. This assertion, however, was made in his pleadings, and not under oath in open court, because he did not see proper to testify in his own behalf upon the hearing. An attorney has a right to criticise the courts of this state, so long as his criticisms are made in good faith and in respectful language, and with no design to willfully or maliciously mis-

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represent the position of the courts, or tend to bring them into disrepute or lessen the respect due them. Is this publication a criticism? Certainly not. It is a willful, malicious, outrageous, and unwarranted attack upon the integrity of the courts of this state and the judges thereof, with the sole and only purpose of creating a feeling of ill will and prejudice against the courts of this state and lessening the respect due them. Freedom of speech is one of our boasted guaranties of liberty; but even this right should be curbed when the integrity of the courts are willfully and maliciously assailed. The court has the inherent right to protect itself from such malicious attacks, and we think the publication of this pamphlet by the defendant a willful violation of his duties as an attorney and counselor at law, in that it violates that part of his oath as an attorney which provides that he shall act in the office of an attorney according to his best learning and discretion, with all good fidelity as well to the court as to his client.

Our statute undertakes to limit the grounds upon which an attorney may be suspended or disbarred, and one of these grounds is the willful violation of any of the duties of an attorney or counselor. The statute also in a general way defines the duties of an attorney, but it in no sense attempts to define and set out all of the duties of an attorney. An attorney is an officer of the court, and as such it is his duty not merely to observe the rule of courteous demeanor in open court, but also to abstain, out of court, from all insulting language and offensive conduct toward the judges personally for their judicial acts. 4 Cyc. 908. The oath which an attorney is required to take before being permitted to practice law in the courts of this state is not simply to be obedient to the Constitution and laws of the state, but to maintain at all times the respect due the courts of justice and judicial officers (*Bradley v. Fisher*, 80 U. S. [13 Wall.] 335, 20 L. Ed. 646; *In re Breen*, 30 Nev. 164, 93 Pac. 997), and for a violation of these duties an attorney may be suspended or disbarred. The defendant in this cause has not shown the proper respect due the courts of this state and the judges thereof.

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In the petition above referred to, which the defendant prepared and filed in the district court of Oklahoma county, he reiterates, to a very large extent, the contents of the pamphlet or book, and in fact attaches the pamphlet to the petition as an exhibit and makes it a part thereof, and asks judgment against the defendants, including the district, superior, and county judges of Oklahoma county, and the district judge of Cleveland county, and the members of the Supreme Court and others, for \$250,000. It is insisted by counsel for defendant that he cannot be suspended or disbarred for filing a pleading in court under our statutes. This contention, we think, is correct, but we think the petition and the exhibit are competent evidence to be considered along with other evidence in the case, as affecting the defendant's mental and moral fitness to continue to practice law before the courts of this state. He certainly did not expect to recover a judgment against the judges of the Supreme Court and the inferior courts of the state. He evidently sought this means to harass and attack the courts of this state and the judges thereof with the hope that he might create a feeling of ill will and prejudice against them, and we think the pleading, with the exhibit attached thereto, are competent evidence upon the general charge of misconduct and moral fitness in the specification of charges.

The Supreme Court of this state has exclusive power to admit attorneys to practice law before it and in the inferior courts independent and aside from the statutory grounds of disbarment, the inherent power to suspend or disbar attorneys. *In re Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552; *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646; 4 Cyc. 905; *In re Newby*, 76 Neb. 482, 107 N. W. 850; *In re Robinson*, 48 Wash. 153, 92 Pac. 929, 15 L. R. A. (N. S.) 525, 15 Ann. Cas. 415; *In re Wilson*, 79 Kan. 450, 100 Pac. 75; *In re Durant*, 80 Conn. 140, 67 Atl. 497, 10 Ann. Cas. 539; *In re Breen*, 30 Nev. 164, 93 Pac. 997; *In re Ebbs*, 150 N. C. 44, 63 S. E. 190, 19 L. R. A. (N. S.) 892, 17 Ann. Cas. 592; *In re Thatcher*, 80 Ohio St. 492, 89 N. E. 39; *In re Egan*, 22 S. D. 355, 117 N. W. 874; *Danforth v. Egan*, 23 S. D. 43, 119 N. W. 1021, 139 Am. St. Rep. 1030, 20 Ann. Cas. 418; *Underwood v. Commonwealth*

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(Ky.) 105 S. W. 151; *In re Simpson*, 9 N. D. 379, 83 N. W. 541; *State ex rel. Atty. Gen. v. Burr*, 19 Neb. 593, 28 N. W. 261; *State v. Mosher*, 128 Iowa, 82, 103 N. W. 105, 5 Ann. Cas. 984.

After a thorough consideration of all the testimony in this case, we are of the opinion that his conduct is such that he is not a fit and proper person to practice law in the courts of this state, and that his license should be revoked.

It is therefore ordered, adjudged, and decreed by the court that the license of the defendant to practice law before this court and the inferior courts of this state be and the same hereby is revoked, and that the costs in this case be taxed against the plaintiff.

JOHNSON and ZEVELY, Special Judges, concur; BURFORD and HUBBELL, Special Judges, dissent.

BURFORD, SPECIAL JUDGE (dissenting). I regret that I am unable to concur in the judgment pronounced by the majority of the court. In my judgment the defendant Sullivan is not a fit or proper person to engage in the practice of law in the state of Oklahoma, but I cannot come to the conclusion that under the laws in force in this state there is authority for disbarment.

The charges against defendant, when reduced to their ultimate conclusion, charge him with being mentally and morally unfit to engage in the practice of law. This charge is based upon the publication of two certain pamphlets reflecting in the most bitter and malicious way upon the various courts of this state. Sufficient substance of these pamphlets is set out in the majority opinion of the court. Assuming with the court that the publication of these pamphlets within the period of limitation and their falsity have been properly established, I yet cannot conclude that they constitute proper grounds for disbarment. Section 266 of Snyder's Statutes (Comp. Laws 1909), provides in part:

"The following are sufficient causes for suspension or revocation: First, when he has been convicted of a felony under the laws of Oklahoma, or a misdemeanor involving moral turpitude, in either of which cases the record of conviction is conclusive evidence. Second, when he is guilty of a willful disobedience or violation of any order of the court requiring him to do or forbear any act connected with or in the line of his profession.

Third, for the willful violation of any of the duties of an attorney or counselor: Provided, that whenever any act is done by the attorney for an honest purpose or with the intent to discover the truth in some matter heretofore being litigated and pending in any tribunal at the time the acts were done, or to prevent litigation, then they shall not be grounds for revocation or suspension of the attorney's license. The filing of any pleading or exhibit in court shall not be cause for suspension or revocation of the attorney's license, but may be punished as a contempt and according to the laws governing proceedings in contempt cases. *An attorney's license shall not be revoked or suspended for any cause or in any manner except as provided in this chapter of the statutes of this state as amended by this act."*

It is not charged that the defendant has been convicted of a felony or a misdemeanor involving moral turpitude. It is not charged that he has been guilty of any willful disobedience or violation of any order of court. The charges, therefore, cannot be brought under the first or second subdivision of the statute. Has he been guilty under the third subdivision, to wit, of any willful violation of the duties of an attorney or counselor? These duties are specifically set out in section 257 of Snyder's Statutes (Comp. Laws 1909), as follows:-

"(1) It is the duty of an attorney and counselor *while in the presence of the courts of justice* or in the presence of judicial officers engaged in the discharge of judicial duties, to maintain the respect due to the said courts and judicial officers, and at all times to obey all lawful orders and writs of the court. (2) To counsel and maintain no actions, proceedings or defenses, except those which appear to him legal and just, except the defense of a person charged with a public offense. (3) To employ for the purpose of maintaining the causes confided to him such means only as are consistent with truth and never to seek to mislead the judges by any artifice or false statements of facts or law. (4) To maintain inviolate the confidence, and, at any peril to himself, to preserve the secrets of his client. (5) To abstain from all offensive personalities, and to advance no fact prejudicial to the honor or reputation of a party or witness unless required by the justice of the cause with which he is charged. (6) Not to encourage either the commencement or continuance of an action or proceeding from any motive of passion or interest. (7) Never to reject for any consideration personal to himself the cause of the defenseless or the oppressed."

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I cannot conceive that the publication of a pamphlet outside of court which makes unwarranted reflections upon the courts and the officers thereof can be construed to come under any of the seven subdivisions of the duties of an attorney as specified in the statute. The defendant has perhaps failed to maintain the respect due to courts and judicial officers, but this failure was not charged or proven to be in the presence of any court, and the statute specifically limits the application of such language to conduct in the presence of judicial officers. The majority of the court seem to place the alleged misconduct of the defendant under the subdivision "not to encourage either the commencement or continuance of an action or proceeding upon any motive of passion or interest." I cannot agree that the publication and circulation of this pamphlet encouraged the commencement or continuance of any action or proceeding. It is charged that such pamphlet was filed in the district court of Oklahoma county, attached as an exhibit to a pleading. Section 266 expressly provides that the filing of a pleading or exhibit shall not be cause for suspension or revocation of an attorney's license, and I cannot conclude that the publication and circulation of this pamphlet outside of court would in any way have affected the commencement or continuance of any action or proceeding whatsoever.

I am forced to the conclusion, therefore, that the defendant's conduct does not constitute a violation of any of the duties of an attorney as prescribed by our statutes, and that, therefore, neither of the three statutory causes of disbarment has been proven against him. Nor can I agree with the court that the inherent power exists in the Supreme Court to disbar an attorney for other than the grounds laid down in the statute. Undoubtedly, at common law, inherent power existed in courts of record to suspend or disbar the attorneys practicing before such court when the power of admission was vested in the court exercising the power of disbarment. Undoubtedly, at common law, the publication of a false and malicious pamphlet reflecting upon the courts, as does the one in the case at bar, would constitute proper grounds for disbarment. Perhaps the weight of authority is to the effect that, where statutes have been passed merely declaring what

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shall be grounds for disbarment without any prohibition therein contained, the courts may continue to exercise the inherent power of disbarment for causes other than those named in the statute, upon the principle and assumption that the grounds named by the statute are not intended to be exclusive. But our statute specifically provides that:

"An attorney's license shall not be revoked or suspended for any cause or in any manner except as provided in this chapter of the statutes of this state as amended by this act."

I have been unable to find a single adjudicated case that goes so far as to hold that such a statute may be swept aside and declared invalid and the court proceed to exercise the power of disbarment which formerly inhered in it. A few cases touching upon this subject will be noted.

In the case of *In re Lambuth*, 18 Wash. 478, 51 Pac. 1071, cited in the case of *In re Robinson*, 48 Wash. 153, 92 Pac. 929, 15 L. R. A. (N. S.) 525, 15 Ann. Cas. 415, the court, speaking of the power of disbarment, says:

"But power to strike from the rolls is inherent in the court itself. No statute or rule is necessary to authorize the punishment in proper cases. *Statutes and rules may regulate the power, but they do not create it.*"

If the statute may regulate the power of this court, then it is apparent that the Legislature has, in as strong language as could be used, limited the power to disbar to the causes named in the statute.

In *Re Peyton*, 12 Kan. 404, Judge Valentine says that the power to disbar "is a necessary incident to the proper administration of justice; that it may be exercised without any special statutory authority, and in all proper cases, *unless positively prohibited by statute.*" Here the judge, even while asserting the inherent power of the court, recognizes the power of the Legislature to prohibit the exercise of it.

In *Re Smith*, 73 Kan. 743, 85 Pac. 584, the Supreme Court of Kansas, in declaring that a court may punish for causes other than those enumerated in the statute, shows the reason of the rule:

"As will be observed, the statute does not provide *that the only causes* for which the license of an attorney may be revoked

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or suspended are those specified in the statute, nor does it undertake to limit the common-law power of the courts to protect itself and the public by excluding those who are unfit to assist in the administration of the law. It merely provides that certain causes shall be deemed sufficient for the revocation or suspension of an attorney's license."

In this state the Legislature has prescribed the *only causes* for which a license may be revoked or suspended.

In *Re Mills*, 1 Mich. 392, where it is held that the statutory grounds are not exclusive, the court in discussing the statute, says:

"That the Legislature never intended to withhold from our courts the exercise of a power so necessary to preserve the administration of justice from pollution, and the public from imposition."

In this state, on the contrary, the Legislature has expressly said that it intended to withhold this power.

In *Delano's Case*, 58 N. H. 5, 42 Am. Rep. 555, the court says that the act of the Legislature was not intended to be exclusive.

In *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407, the court holds that the statute there in force is applicable only to a proceeding for disbarment, whereas the proceeding being considered was one for suspension.

In *Bar Association v. Greenhood*, 168 Mass. 169, 46 N. E. 568, the court holds that, there being no prohibition in the statute, the grounds therein set up will not be held to be exclusive.

Similar adjudications may be found in *Sanborn v. Kimball*, 64 Me. 140; *Serfass' Case*, 116 Pa. 455, 9 Atl. 674; *State v. Gebhardt*, 87 Mo. App. 542, and others.

In no case which I have been able to examine has the court held, in the face of a prohibition such as is contained in our statute, that the inherent power of the court to disbar continued. On the other hand, in *Ex parte Yale*, 24 Cal. 243, 85 Am. Dec. 62, the court, speaking of attorneys and their duties, said:

"The manner, terms, and conditions of their admission to practice, and of their continuing in practice, as well as their powers, duties, and privileges, are proper subjects of legislative control to the same extent and subject to the same limitations as in the case of any other profession or business that is created or regulated by statute."

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In *Re Collins*, 147 Cal. 13, 81 Pac. 222, the court said:

"Whatever the rule may be in the absence of statutory regulations as to the power of courts to deprive attorneys of their license for causes which, in the judgment of the court, may warrant that action, we are satisfied that, when the Legislature has specified the acts for which an attorney may be disbarred or suspended, the court is not authorized to act for other causes, or warranted in invoking an asserted implied power to amove for causes not specified in the statute; that the Legislature has the power to regulate the causes for which a disbarment or suspension of an attorney may be had; and that the courts are bound by this regulation and the limitation it imposes."

In *Re Eaton*, 4 N. D. 514, 62 N. W. 597, the court said:

"Where the statute enumerates grounds for disbarment of an attorney, no other ground can be considered by the court."

To the same effect is *Ex parte Schenck*, 65 N. C. 353; *State v. Byrnett*, 4 Ohio Dec. 89; *Ex parte Smith*, 28 Ind. 47; *Kane v. Haywood*, 66 N. C. 1; *Ex parte Trippe*, 66 Ind. 531.

Both under principle and authority I am unwilling to concede the power of this court to sweep aside the specific language of the Legislature acting upon a matter which I believe to be within its power. It is to be regretted that such a law is upon our statute books; but, finding it there, in my judgment the courts must leave the remedy to the people and the Legislature rather than to their own power. Even under the statute as it exists, the facts alleged in the petition for disbarment constitute a crime of which the defendant might regularly have been indicted and convicted, and such conviction would have operated as a conclusive ground for disbarment in this court.

I am therefore forced to dissent from the judgment of the court that the defendant be disbarred.

ON APPLICATION FOR REHEARING.

ZEVELY, SPECIAL CHIEF JUSTICE. The respondent was tried before this court, composed of five special justices, upon the charge of uttering a document defamatory of and grossly disrespectful to the five regular justices of this court. He was ad-

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judged guilty and disbarred from practice, and he now files an application for rehearing based on thirteen several grounds, which will be discussed *seriatim*.

1 and 9. It is contended by respondent that his right to practice his profession as an attorney is property, and that under the due process of law provision of the Constitution he could not be deprived of such property without a jury trial. Conceding for the sake of argument, without deciding, that this professional capacity is property, a jury is not indispensable in a trial for disbarment. That he is not entitled to a jury has been expressly decided by the highest authority, which we are content to follow. *Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552, 562; *Davis v. State*, 92 Tenn. 643, 23 S. W. 62; *In re Goodrich*, 79 Ill. 148; *In re Shepard*, 109 Mich. 633, 67 N. W. 972. Nor are we aware of any authority in conflict with this view.

2 and 3. If the Bar Commission is not a legal entity, its regulator Ben Williams must be deemed sole complainant. As he is a natural person capable of making the complaint, it is immaterial whether he or the Bar Commission is to be deemed the complainant. But this is not technically a suit by the complainant; the only purpose of requiring a complainant at all is to have a moral sponsor for the charges who shall be responsible for costs if cast therefor. Nor is it material whether the committee presenting the charges had authority to present them from any other person or body. *Fairfield v. Taylor*, 60 Conn. 14, 22 Atl. 442, 13 L. R. A. 769. In that case the court, by Andrews, C. J., said:

"It was the duty of the attorneys, if they knew of unprofessional conduct by the appellant or any other attorney, to bring it to the attention of the court. An appointment by the bar to do that which it was their duty to do without any appointment could give no added authority. Nor was any such appointment necessary to give the court jurisdiction. The court might summon the appellant to a hearing upon any information it had that it deemed worthy of credit, whether it came from lawyers or laymen. The manner in which the proceeding should be conducted, so that it be without oppression or injustice, was for the court itself."

Ex parte Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552.

4. It is complained that the Supreme Court does not appear to have ordered the filing of the charges. There is no merit in this contention, especially at this late day. The court has taken jurisdiction of the charges and had a trial, which is a sufficient authorization for all practical purposes. The lack of a prior formal authorization works no prejudice to defendant, even if one was necessary, which we do not decide. If this objection is worthy of consideration at all, it should have been interposed *in limine*.

5 and 6. These grounds complain that the complaint is brought by Ben Williams on behalf of the Bar Commission, and that the charges are sworn to by one Stringer. It is not essential to jurisdiction to hear this case that the original petition should be sworn to. Even if necessary to be sworn to, the oath of Stringer was enough, though upon information and belief. *In re Shepard*, 109 Mich. 633, 67 N. W. 972. Nor was the objection asserted *in limine*, as it should have been to be available.

7. The contention that the guilt of the respondent should be proven beyond a reasonable doubt, as in criminal cases, is not sound.

"In the case of *Ex parte Wall*, 107 U. S. 265 [2 Sup. Ct. 569, 27 L. Ed. 552], the Supreme Court in speaking of this question said: 'The proceeding is in its nature civil, and collateral to any criminal prosecution by indictment. The proceeding is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practice in them.' In the case of *People ex rel. Shufeldt v. Barker*, 56 Ill. 299, the Supreme Court of that state, with reference to such a proceeding, said: 'The respondent, in express terms, denies the charge exhibited against him, and to overcome this express denial there ought to be required more than a mere preponderance of evidence. A charge so grave in its character, and so fatal in its consequences, ought certainly to be proved by what the law denominates a clear preponderance of the evidence.' These courts recognize in this rule, as we believe, that the proceeding is a civil one, and not a criminal one." (*In re Brown*, 2 Okla. 590, 39 Pac. 469.)

8 and 12. Nor is the offense with which respondent was charged barred by limitations. While there may be some classes of offenses which may be barred by limitations, this is not one

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of them. In speaking of a similar charge against an attorney for disrespectful conduct towards the court, the Supreme Court of California said:

"As to the objection made that the offenses charged are barred by the statute of limitations, it appears that the acts complained of were committed some three years since. We do not understand that a charge of this kind can be barred by the statute of limitations, or that it should be, under any circumstances. The fullest opportunity should be given to investigate the conduct of an attorney who is charged with a violation of his duties as such; and while this court might not be willing to disbar or suspend an attorney if it appeared that there had been unreasonable delay in the presentation of the charges, so that a fair opportunity could not be had for procuring the witnesses and meeting the accusation, we are not prepared to say as a matter of law upon this demurrer that the accusation is barred either by the express terms of the statute of limitations or by analogy." (*In re Lowenthal*, 78 Cal. 427, 21 Pac. 7.)

This court, in the case of *In re Mosher*, 24 Okla. 61, 102 Pac. 705, 24 L. R. A. (N. S.) 530, 20 Ann. Cas. 209, quoted the language of the California court with approval when discussing the identical statute of limitations now invoked by respondent.

There has not been cited to us, and we doubt that there can be found, any authority sustaining a plea of statute of limitations to a proceeding for disbarment upon charges of conduct disrespectful to the court. The authorities rather sustain the contention that the courts have inherent power to protect their own dignity and enforce respect and punish disrespect from the attorneys practicing therein. *In re Brown*, 2 Okla. 590, 39 Pac. 469; *In re Goodrich*, 79 Ill. 148; *Beene v. State*, 22 Ark. 157.

"It is a general rule that the Legislature is powerless to interfere with the jurisdiction, functions, or judicial powers conferred by the Constitution upon a court, nor can it diminish, enlarge, transfer, or otherwise infringe upon the same." (11 Cyc. 706.)

"While the statutes of many of the states authorize the suspension or removal of attorneys upon specified grounds, it has generally been held that such statutes do not restrict the general powers of the court over attorneys, who are its officers, and that they may be removed for other than statutory grounds."

Our own Constitution emphasizes the independence of the three great departments of government, each from the other, by section 1 of article 4, reading as follows:

"Section 1. The powers of the government of the state of Oklahoma shall be divided into three separate departments: The legislative, executive, and judicial; and except as provided in this Constitution, the legislative, executive, and judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others."

It may be difficult to lay down any general rule, applicable to all cases, defining the exact boundaries between the power of the courts established by the Constitution and the power of the Legislature with reference to the admission to practice and disbarment of attorneys, who are officers of the courts. There may be a broad field of operation for proper legislative enactment upon this subject without encroaching upon the inherent powers of the court to protect its own dignity from contemptuous assault. The Legislature, in creating statutory offenses meriting disbarment, may conceivably prescribe proper rules of limitation, especially in courts of statutory creation. Without attempting to decide anything but the pending case, we lay down the principle that the Legislature has no power to fix a limitation, either as to time or upon the power of this court, that could be set up in bar of this prosecution. It would be intolerable if the attorneys, who are officers of the court, could treat the court with pronounced disrespect and be immune from disbarment by reason of the lapse of short time or other technicality. This court is established by one Constitution, and it is not competent for the Legislature to abolish it directly or indirectly, nor can it take away from this court those powers which inhere in similar courts at common law and which vested in it by virtue of its very establishment by the Constitution. If it were competent for the Legislature to enact that such offenses could not be punished by disbarment after one year, they could put a limitation of one day as well, and thus practically abolish the inherent power of the court to protect itself from further assaults by disrespectful practitioners. We cannot admit that the Legislature has power to encroach upon the inherent constitutional powers of this court, and are persuaded

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that by the enactment of the act of limitation invoked in this case the Legislature had no intention of giving the statute such an application as would so encroach.

Even if the Legislature had the power and intended the act of limitation to apply to charges of disbarment for conduct disrespectful to the courts, it may well be doubted whether it would apply in the present case. The act complained of was a case of the publication of a document in its nature grossly libelous of the regular members of this court. So long as the document remained in circulation, it was a continuous offense against the dignity of this court, and the offense cannot be said to be ended within the meaning of an act of limitation so long as it is outstanding, unsuppressed, and unatoned for. The first utterance of the offensive matter may constitute offense sufficient to merit punishment, but its continuous remaining in the state of offense is none the less an affront to the dignity of the court. It would be possible, if defendant's contention is correct, to give wide circulation in remote localities to a libelous document grossly disrespectful to the court which might impair the usefulness of the court, and yet not be punishable because not brought to the court's attention within the short period of limitation. The affront to the court's dignity and the tendency to impair its usefulness and to weaken the confidence of the people in it by means of the libel takes place whether the court knew of it or not, and the power of the court to protect itself from such indignities should not be made to depend upon the fact or quickness of discovery of it. The court should not tolerate at its bar anybody who is now disrespectful or has at any time in the past been guilty of disrespectful conduct not fully excused or punished.

For the reasons just stated, we must also overrule the contention that the court is limited in its disciplinary power to the grounds and remedies indicated by statute. The statutory provisions are wise, but are merely cumulative, and do not impair the inherent constitutional power of the court to deal with such contempts in a proper, though nonstatutory, way. In Wyoming an attorney was charged with applying vile epithets to the court

State Bar Commission ex rel. Williams v. Sullivan.

out of its hearing and the defendant was disbarred. The court, through Lacey, C. J., said:

"Our statute provides that this court 'may revoke or suspend the license of any attorney or counselor at law to practice therein, * * * fifth, for the willful violation of any of the duties of attorney or counselor.' The statute does not define the duties of an attorney or counselor. We have also a general statute adopting the 'common law of England, as modified by judicial decision,' and expressly providing that that common law 'shall be considered as of full force until repealed by legislative authority.' Comp. Laws, p. 193, sec. 1. The duties of an attorney in this territory are therefore the same as under the common law, his first duty being to the court of which he is an officer. 'The obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the bar, is not merely to be obedient to the Constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct towards the judges personally for their judicial acts.' *Bradley v. Fisher*, 13 Wall. 335, at page 355 (20 L. Ed. 646). The fountain of the power of the courts to remove attorneys as exercised at common law, is St. 4 Henry IV, c. 18, which is as follows: 'And if any such attorney be hereafter found notoriously in any default of record or otherwise he shall forswear the court and never after be received to make any suit in any court of the king. They that be good and virtuous and of good fame shall be received and sworn at the discretion of the justices, and, if they are notoriously in default, at discretion may be removed upon evidence of record or not of record.' It seems to us that the power to remove under our statute and the causes sufficient for removal, are as broad and comprehensive as at common law. Further, so far as questions now arising in this case are concerned, there is nothing in our statute, either expressly or by implication, repealing the common law." (*In re Brown*, 3 Wyo. 121, 4 Pac. 1085, 1087, 1088.)

10. In this tenth ground for the motion for rehearing defendant says:

"That the record and undisputed evidence in this case shows that defendant was arrested for libeling the courts and judges here complained of and in the book here complained of, and his case was set for trial before a jury on October 11, 1910, in the

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county court of Oklahoma county, and these courts and judges by their attorney came into court on the day of trial and against the protest of the defendant dismissed the cases, * * * and we submit that these courts and judges having elected their remedy and voluntarily abandoned it, this proceeding should be dismissed."

It must be manifest that no other courts or attorneys could make an "election" that would deprive this court of its inherent disciplinary power to purge its rolls of attorneys of unworthy members, nor can it be seriously contended that this court made or estopped itself by an appearance (if such can be imagined) in the *nisi prius* court referred to. It appears that the charge in the court referred to was a simple charge of criminal libel, upon which defendant could have been punished on proof of guilt, without impairing the power of this court to disbar him. In the dismissal of the criminal charge in the *nisi prius* court defendant was more fortunate than deserving.

11. The defendant's eleventh contention is highly technical and without merit. Though the court sustained a motion to make allegations more definite and certain, the allegations which were the subject-matter of the motion were not abandoned or thereby put out of court. Defendant's failure to insist upon compliance therewith operated as a waiver thereof. It is evident that the defendant was not misled or prejudiced by any obscurity, indefiniteness, or uncertainty therein, and he points out none such in the motion for rehearing.

13. Respondent objects that he was not present when the decision of this court was rendered. He was within the jurisdiction of the court, and it was his duty to attend upon it. There is no law requiring special notice to him that the court will render a judgment in his case. He has every right he would have had were he present, and is not injured even by his own neglect to be present. He also complains that only two of the five special justices were "present and concurring when said decision was handed down." The fact is, and the record shows, that a quorum of the court was present and concurring in the decision at its ren-

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dition. Neither law nor custom requires a majority of the court to announce a decision in chorus. This objection is obviously without merit.

The application for rehearing is overruled.

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No. 1264. Opinion Refiled April 15, 1913.

1. **RAPE—Civil Liability of Perpetrator.** Rape of a female gives her a cause of action for damages against the perpetrator.
2. **SAME—Definition of Crime.** Rape, as defined by the second subdivision of section 2353, Comp. Laws 1909, is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, where the female is over the age of sixteen years and under the age of eighteen, and of previous chaste and virtuous character.
3. **SAME—Action for Damages—Defenses—Consent of Female.** To show that such a female consented to the act or acts of sexual intercourse will not constitute a defense to a civil action to recover damages for an assault upon her committed in such manner and under such circumstances as to constitute rape.
4. **APPEAL AND ERROR—Theory of Case—Consistency on Appeal.** The cause was submitted below upon the theory that in order for the plaintiff to maintain her cause of action, it was necessary to satisfy the jury that if the defendant had sexual intercourse with her it was accompanied with intent on his part to effect that purpose in defiance of all resistance and without her consent. **Held,** that on appeal it must be reviewed upon the same theory.
5. **RAPE—Civil Liability—Sufficiency of Evidence.** Evidence examined, and **held** sufficient to authorize the submission of the cause to the jury, and to sustain the verdict rendered thereon.
6. **SAME—Admissibility of Evidence—Offspring as Exhibit.** In an action for damages for rape, a child two and a half years of age, alleged to be the fruit of the illicit intercourse, may be exhibited to the jury by the plaintiff for the purpose of establishing the facts of birth and of prior unlawful intercourse.

(Syllabus by the Court.)

*Error from District Court, Canadian County;
John J. Carney, Judge.*

Opinion of the Court.

Action by Marietta Taylor, by her next friend, E. E. Taylor, against H. F. Watson. Judgment for plaintiff, and defendant brings error. Affirmed.

E. G. McAdams, for plaintiff in error.

H. L. Fogg, for defendant in error.

KANE, J. This was a civil action for damages, commenced by the plaintiff, Marietta Taylor, by her next friend, E. E. Taylor, for a rape committed upon her by the defendant, H. F. Watson. Upon trial to a jury there was a verdict for the plaintiff, upon which judgment was duly entered, to reverse which this proceeding in error was commenced. For convenience the parties hereafter will be called plaintiff and defendant, respectively, as they appeared in the court below.

The evidence of the plaintiff was to the effect that she was an unmarried female, seventeen years of age, of chaste character previous to the time of her relations with the defendant; that the defendant was a neighbor of her family, with whom she resided, and often visited their home on terms of friendly intimacy. That two or three weeks before Christmas, 1905, her mother sent her to the well near the house to get a pail of water; that just after she turned around to leave the well, the defendant came out of the dark, took hold of her arm and pushed her toward the orchard some twenty steps, and there threw her down and commenced to pull up her clothes; that she called to her mother, whereupon the defendant jumped up and ran away, warning her not to tell what had happened; that she did not tell what happened because she was afraid of the defendant. As to what was said and done on that occasion, she testified:

"A. He said come on and go with him; I said no; he said yes, come on; and I said no, and hollered for ma; but she didn't hear me; the house was shut up, and he taken me on down across the road, the road that led into the orchard, and he threw me down there."

That a short time after the incident at the well, she and her mother accompanied the Watson family to a box supper in the neighborhood; that, at the invitation of the Watson family, the

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Taylor family consented to remain over night at their home; that there were not quilts enough at the Watson home to provide for their guests, and the plaintiff and defendant and his daughter went to the Taylor home in a wagon to supply the deficiency; that, upon arriving at the Taylor home, the plaintiff told defendant and his daughter to go into the house and get the quilts, whereupon defendant required his daughter to hold the team and he accompanied plaintiff into the house; that, after entering the house, the defendant came into the room where the plaintiff was and threw a quilt on the floor and threw her down upon it, and attempted to take improper liberties with her; that, after struggling with him and pushing him away, he desisted, whereupon they all returned to the Watson home. That, a short time after this, the plaintiff remained overnight at the Watson home for the purpose of accompanying Mrs. Watson to Oklahoma City the next morning; that sometime during the night the defendant entered her room, lighted a match, and looked over at a bed where his two little boys were asleep, and then sat down on her bed; that he attempted to have sexual intercourse with her, but did not succeed, and left the room warning her that she "had best not tell anyone what had happened." That on the 14th of January thereafter plaintiff spent the night at the Watson home; that sometime during the night she awoke and saw the defendant standing by her bed. Her testimony as to what occurred is as follows:

"Q. You say when you woke up he was standing there? A. Yes, sir. Q. Did he say anything to you? A. Yes, sir. Q. What did he say? A. He said that I had better not tell it. I told him to get out of there, and he said no, and after he got in bed and had sexual intercourse he told me I had better not tell it. Q. What did he say before that? A. That it would not hurt me, or that he would either bet his farm or give his farm it would not hurt me or amount to anything. Q. Then what did he do? A. He went out and unlocked the door and went out in through the kitchen, and in about a half hour he came back in and did the same. Q. Did you scream out or holler? A. No, sir; I was scared. Q. Why didn't you scream out? A. Because I was so scared and nervous that I could not holler. Q. And what did you do, if anything, in resisting him? A. I turned over on my stomach, and he took hold of me and turned me back over."

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On the 8th of the following October a child was born to the plaintiff which she testified was the fruit of her intercourse with the defendant. Plaintiff testified further as follows:

“Q. When was the first time you ever told anybody about this? A. The 30th of August. Q. The 30th of August, 1906; you say this last time occurred on the 14th of January, and you never told anybody about it until the 30th of August? A. Yes, sir. Q. You had been pregnant about seven months about that time, hadn't you? A. I guess so. Q. It was so that it was quite perceptible, wasn't it? A. Yes, sir. Q. And it got to where you could not conceal it any longer and you told your mother about it? A. She asked, and I told her. Q. Did you ever tell Watson anything about it—that you were in a family way? A. No, sir; I never did. * * * Q. And did you tell your folks about any of those incidents? A. No, sir. Q. Why didn't you? A. Because I was afraid to, and the shame and the disgrace of it.”

The testimony of the plaintiff generally was to the effect that the act of sexual intercourse was accomplished against her will and in spite of all the resistance she could make under the circumstances, and that, although it was committed at a place where any considerable outcry would have been heard by members of the defendant's family, some of whom (three small children) were sleeping in the same room, she did not scream or cry out because she was “so scared and nervous” that she could not.

The defendant, in his own behalf, denied any sexual intercourse with the plaintiff and that he ever took any improper liberties with her, leaving her testimony otherwise uncontradicted. There was no attempt to show that the plaintiff was not of previous chaste and virtuous character, or that she ever had sexual intercourse with any other man than the defendant, or with him, except upon the occasions detailed by her in her testimony. Counsel for defendant states his first and principal contention as follows:

“The first assignment of error is that the court erred in overruling plaintiff in error's demurrer to the evidence of the defendant in error, introduced for and on behalf of the defendant in error in said cause. The court will observe that there is absolutely no testimony to show that the defendant Watson used any force or violence in accomplishing this alleged act. Nor was the plaintiff, Marietta Taylor, prevented from resisting, by

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threats of immediate or great bodily harm accompanied by power of execution. The court will also observe that at the time of this alleged assault the plaintiff was a woman weighing between 135 and 140 pounds; that there is no testimony that she made any resistance whatever, or that she made any outcry. Under these circumstances, we contend that the law presumes that she consented to this unlawful act of sexual intercourse, if there was any act of sexual intercourse, and if she did consent, she cannot recover in this action."

We cannot agree with counsel. It is true that the case was submitted to the jury upon the erroneous theory that in this jurisdiction consent and resistance are necessary elements to constitute the crime of rape upon a female of previous chaste and virtuous character, over the age of sixteen years and under the age of eighteen, but granting, as contended for by counsel for the defendant, that the cause must be determined here upon the same theory (*Herbert v. Wagg et al.*, 27 Okla. 674, 117 Pac. 209), it seems to us that there was sufficient evidence adduced at the trial tending to establish resistance and nonconsent to justify the trial court in submitting the cause to the jury, and to sustain the verdict returned.

In *Kaufman v. Boismier*, 25 Okla. 252, 105 Pac. 326, it is said:

"It has been held not only by this court, but also by the Supreme Court of the territory of Oklahoma, in numerous cases, that it will not disturb the verdict of a jury upon controverted questions of fact, and it is immaterial whether such questions arise from direct or circumstantial evidence. The jury had the opportunity of seeing the witnesses on the stand face to face and observing their manner, apparent fairness and candor, or want of it. This is not available to this court in a re-examination of evidence, and, where there is any reasonable evidence tending to support the verdict, it will not be disturbed here."

If this were a criminal case, where the prosecution is bound to prove the charge beyond a reasonable doubt, it would probably be controlled by *People v. O'Sullivan*, 104 N. Y. 451, 10 N. E. 880., and cases of that class, cited by the defendant. But here, whether the charge was established by a preponderance of the evidence largely depended upon the credit to be given to the testimony of the plaintiff, and that was a question for the jury.

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The evidence shows the defendant to be a strong man, of mature years, with a large family, some of whom were grown at the time of the offense. His intimate and friendly relation with the family of the plaintiff gave him opportunities to discover that he wielded great influence over her and that on account of her youth and inexperience he could probably accomplish his evil purpose without great physical resistance. There is no evidence that the plaintiff sought the company of the defendant or threw herself in his way, or in any manner encouraged his advances, but, on the contrary, it all tends to show that he in every instance was the aggressor, and that he seized every opportunity to lay hold of her and forcibly carry her off in pursuance of his evil purpose, and that it was only after three unsuccessful attempts that he finally succeeded in overcoming her uniform resistance. As was said in a similar case:

“It is not often that such an assault is or can be described by a female with that complete fullness of detail with respect to every word spoken or every fact and circumstance that may enter into the questions of consent or resistance. When the proof is given, as it sometimes is, in general terms, the jury must still be satisfied that there was no consent, and that resistance was made to the extent of the woman’s ability. What that ability was must in many cases depend not only upon her strength and power to defend herself or make herself heard, but also upon the element of fear, when it exists. The age, strength, and physical appearance of the parties, with the manner in which they testify, are elements of some importance which the jury may consider with all the other facts. The relation which the parties bear to each other, as in this case, may also be considered. Where on one side we find extreme youth, inexperience, and dependence united with the principle of fear and obedience, and on the other, mature age, great physical power, and dominating influence and control over the movements and will of another, the question of consent and resistance must be determined with reference to those conditions.

“When such a case arises, who is to determine when, as in this case, the girl, in stating the occurrence, states that she did not consent and did resist to the best of her ability, whether she tells the truth or not? Can this court, after the jury have accepted the plaintiff’s version of the transaction and the General Term has approved the verdict, say, as matter of law, that

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there was no evidence for the consideration of the jury? This, I think, would be to transcend the limits of our jurisdiction as a court of law, without power to review disputed facts."

Dean v. Raplee, 145 N. Y. 319, 39 N. E. 952; *Schenk v. Dunklow*, 70 Mich. 89, 37 N. W. 886; and *Witzka v. Moudry*, 83 Minn. 78, 85 N. W. 911, are cases of this class wherein verdicts for the plaintiffs, rendered upon similar states of fact, were upheld on appeal.

Moreover, our statute provides (section 2353, Comp. Laws 1909) that all that is required to constitute the crime of rape is an "act of sexual intercourse accomplished with a female, not the wife of the perpetrator. * * * Where the female is over the age of sixteen years and under the age of eighteen, and of previous chaste and virtuous character." The language of the statute is clear and unambiguous. It clearly eliminates the elements of consent and resistance from the case of an assault upon the class of females therein described. Its manifest purpose is to throw a protecting mantle about the female children of this state within certain ages, which the hand of the libertine may not withdraw except at his peril. The statute in effect says that chastity is such a precious gem in the crown of maidenly graces that it cannot be stolen or removed therefrom even with the consent of the wearer, without offending the majesty of the law. To prove that the female consented will not mollify the statute, neither should it avail as a defense to a civil action for damages for an assault upon her committed in such manner and under such circumstances as to constitute rape as defined by the statute. *Altman v. Eckerman*, 132 S. W. (Tex.) 523. Whilst we concede that under the authorities the case must be determined in this court upon the same theory upon which it was submitted to the jury, yet the reasons which induced the Legislature to pass the foregoing statute cannot be ignored. The statute is obviously based upon the principle that consent or nonresistance on the part of a girl of tender years is not to be understood in the same way as in the case of like acts committed upon a woman of more mature years. The jury could have taken the same view of the case. *Dean v. Raplee, supra*. It is impossible to lay down any general rule which shall define the exact line

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of conduct which shall be pursued by an assaulted female under all circumstances, as the power and strength of the aggressor, and the physical and mental ability of the female to interpose resistance to the unlawful assault, and the situation of the parties, must vary in each case. What would be the proper measure of resistance in one case would be totally inapplicable to another situation accompanied by differing circumstances. One person would be paralyzed by fear and rendered voiceless and helpless by circumstances which would only inspire another with higher courage and greater strength of will to resist an assault. A young and timid girl might be easily overpowered and deprived of her virtue before she had an opportunity to recover her self-possession, and realize her situation, and the necessity of the exercise of the utmost physical resistance in order to preserve her virtue. It would be unreasonable to require the same measure of resistance from such a person that would be expected from an older and more experienced woman, who was familiar with the springs and motives of human action, and acquainted with the means necessary to be used to protect her person from violence.

It is next contended that it was error for the trial court to permit a child two and one-half years old, alleged to be the fruit of the unlawful intercourse, to be exhibited to the jury over the objection of the defendant. The decisions in the various jurisdictions seem to be divided on this question. They are all collected in notes to *State v. Danforth*, 6 A. & E. Ann. Cas. 557, and *Rex. v. Hughes*, 19 A. & E. Ann. Cas. 534. In the *Danforth* case, decided by the Supreme Court of New Hampshire (73 N. H. 215, 60 Atl. 839), it was held:

"That in a prosecution for statutory rape, the child born to the prosecuting witness may be exhibited by the state to the jury for the purpose of establishing the facts of birth, and of prior unlawful intercourse."

The annotator says that the reported case is in accord with the preponderance of authority, which holds that where the putative father is in court and within the view of the jury, it is not improper to produce the child before the jury and to call attention to points of resemblance or difference between the two.

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A more extended citation of the authorities will serve no useful purpose. It will suffice to say that, after a careful examination of all the cases called to our attention, we have reached the conclusion, approved by Mr. Wigmore (1 Wig. Ev. sec. 166), that:

"The sound rule is to admit the facts of similarity of specific traits, however presented, provided the child is, in the opinion of the trial court, old enough to possess settled features or other corporal indications."

The other assignments of error relate to the pleadings and proceedings had below, and these we are required to disregard, unless they affect the substantial rights of the adverse party. Section 5680, Comp. Laws 1909. We have examined the record with considerable care, and cannot say that the errors complained of, if errors at all, injuriously affected any substantial right of the defendant. The court below submitted the case to the jury upon a theory which, according to our mind, cast an unnecessary burden upon the plaintiff, which she sustained to the satisfaction of the jury. The court below in examining the record, upon motion for new trial, was satisfied with the verdict, and that the defendant had a fair trial according to the forms of law, and, as we also are of that opinion, the judgment of the court below ought to be affirmed. It is so ordered.

HAYES, C. J., and WILLIAMS and TURNER, JJ., concur; DUNN, J., dissents.

DUNN, J. (dissenting). In the conclusion reached by the court in this case I am unable to concur. The chief question raised and argued on this petition for rehearing is that there is no evidence in the record supporting the instructions on the ground of rape by force and violence, and in this contention I am constrained to concur. The instructions which were given by the court were unexcepted to. Hence they are the law of the case, and, right or wrong, the proof must measure thereto, or the verdict will be without adequate support. *Myers v. Fear et al.*, 21 Okla. 498, 96 Pac. 642; *Irwin et al. v. Thompson et al.*,

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27 Kan. 643; *Lynch v. Sncad Architectural Iron Works*, 132 Ky. 241, 116 S. W. 693; *Emerson v. County of Santa Clara*, 40 Cal. 543; *Sullivan v. Otis*, 39 Iowa, 328.

In the case of *Myers v. Fear et al.*, *supra*, Justice Kane, who prepared the opinion for the court, says:

"It is a well-settled rule that, when the verdict of the jury is contrary to the instructions of the court, it should be set aside."

The Supreme Court of Kansas, in the case of *Irwin et al. v. Thompson et al.*, *supra*, in the syllabus says:

"Where a case is tried by a jury and the court gives them instructions, such instructions, if unquestioned and not excepted to, becomes the law of the case; and if the jury in their verdict plainly disregard such instructions, it is the duty of the trial court in the first instance, and of this court on review, to set aside such verdict and grant a new trial."

The Court of Appeals of Kentucky, in the case of *Lynch v. Sncad Architectural Iron Works*, *supra*, in the syllabus says:

"A verdict is contrary to law * * * when it is contrary to the instructions, whether they are right or wrong."

The Supreme Court of California, in the case of *Emerson v. County of Santa Clara*, *supra*, in the syllabus says:

"A verdict of a jury, in disobedience to the instructions of the court, although the instruction itself was not correct in point of law, is a verdict 'against law,' under subdivision 6, sec. 193, Practice Act."

The plaintiff, in her petition, alleged that on January 14, 1906, she was a minor, aged seventeen years, and that the defendant on the night of that day made an assault and committed upon her by force and violence the crime of rape; that as a result thereof, on the — day of October, 1906, she was delivered of a bastard child. Under the laws of this state, a woman of the age of seventeen years may consent to sexual intercourse. • unless she is of previous chaste and virtuous character, and it is rape where she consents only when these conditions exist. Plaintiff in this case chose not to rely upon her previous chaste and virtuous character, but insists that defendant was guilty of rape because he had carnal intercourse with her against her will and by force and violence. At the conclusion of the evidence, the court instructed the jury as follows:

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"If you find from the evidence that the defendant H. F. Watson unlawfully and willfully accomplished the act of sexual intercourse with the plaintiff herein, Marietta Taylor, and that said Watson accomplished the said act of sexual intercourse by force and violence against her will, and that her resistance was overcome by force and violence, then you should find for the plaintiff. Without force, actual or constructive, there can be no rape. To constitute the crime of rape the testimony must show that the plaintiff resisted the alleged assault of the defendant to the utmost of her capacity and extent of her ability, except as hereinafter stated, and if you find from the evidence that the plaintiff submitted to the embraces of the defendant, while she had the power to resist, however reluctantly she may have yielded, such submission deprives the act of an essential element of rape. You are further instructed that should you find from the evidence that the plaintiff herein was prevented from making resistance by threats of immediate and great bodily harm, accompanied by power of apparent execution on the part of the defendant, that this would be equivalent to constructive resistance and would excuse the plaintiff from making actual or forcible resistance to the alleged assault of the defendant; and if raped under these circumstances, the crime or rape would be accomplished notwithstanding her failure to make physical resistance to the alleged attack or assault of the defendant. You are further instructed that if the carnal connection complained of by the plaintiff did not in fact take place against the consent of the plaintiff, she cannot recover in this action."

Herein, then, on the challenge of the plaintiff is laid down the specific rules and law under which this cause must be decided. The intercourse, it is provided, must be by force and violence against her will, and that her utmost resistance was overcome by such force and violence. That if she yielded to the defendant while she had the power to resist, no matter how reluctantly, the offense with which he was charged was not consummated, except there was present threats of immediate and great bodily harm, accompanied by the power of execution. To these heights must the evidence in this case rise, or the verdict rendered by the jury is without support. If there is any evidence in the case which, allowing for it all reasonable deductions to which it is entitled, and all logical conclusions which may be drawn from it, will support the verdict, then it must

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stand. If on the other hand, after the case is stripped of all the evidence of the defendant, who denied *in toto* the charge made, and every inference against the evidence of the plaintiff, there is still lacking evidence sufficient to support the verdict, it must fall. To this test I am willing to subject the uncontradicted evidence given by the plaintiff and to assert that the record is totally devoid of any testimony which any reasonable, rational man ought to say meets the demand set forth in the petition of plaintiff and the instructions of the court. That evidence upon which she must rely discloses that she was a daughter of a neighbor of the defendant, one among several children; that she was seventeen years of age, weighed between 135 and 140 pounds, and on the night of the alleged offense, accompanied the defendant and his family to his home, where she was to remain all night. The questions and answers of the plaintiff are then as follows:

“Q. Did you want to go over with him that night? A. I don't know as I did, but I didn't want them to think it strange of me not going. Q. But you did testify at the preliminary hearing that you wanted to go that night? A. Yes, sir; but I went to keep the folks from mistrusting. Q. You did testify in the preliminary hearing that both wanted to go, so pa held straws so you and sister could draw to see which one would go—that is the way you testified at the preliminary hearing? A. Yes, sir. Q. Now, going over to the house, who went with you over to the house? A. To their house? Q. Yes. A. Mr. Watson and two of the girls and he. Q. Mrs. Watson and— A. Him and the two little girls. Q. How did you go over? A. In the wagon, on a piece of a load of hay. Q. On the wagon, on a piece of load of hay. Where did you all sit? A. Up on top of the hay. Q. Now, that night when you came back from the box supper at Mustang, where did you all sit in the wagon? A. We sat down in the wagon, the best I remember now. Q. I mean on the way home from the box supper? A. We sat down in the wagon, the best I remember now. Q. Who sat on the seat? A. I don't remember; I believe I did. Q. Who sat with him? A. I guess I did; I sat on the seat with him. Q. Who all was at Watson's house that night? A. The night of the 14th? Q. Yes, the 14th of February, or January you now say it is, who was it was there that night? A. His wife and two little girls and him. Q. His wife and two little girls and him? Where did he and his wife sleep? A. In the other bedroom. Q. And where did you

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and the little girls sleep? A. In the other bedroom. Q. Two adjoining bedrooms? A. Yes, sir. Q. Then the little girl slept with you? A. Yes, sir. Q. When you went in you latched the door? A. Yes, sir. Q. Why did you do that. A. Because I thought maybe he might come in, and I latched the door. Q. Is that the reason you latched the door? A. Yes, sir; the best I know now. Q. What did he do? A. He pulled up the covers and I turned over on my stomach as he got into bed. Q. He pulled up the covers, you turned on your stomach, and he got in bed? A. Yes, sir. Q. Then what? A. He turned me over. Q. The girl was sleeping beside you in bed? A. Yes, sir. Q. The little girl five years old, or four or five? A. I don't know how old; I wasn't there when she was born; I don't know a thing about it. Q. You have testified she was four or five? A. I won't say sure how old she was. Q. That was your judgment? A. Yes, sir; but I was guessing at it then; I don't know anything about it. Q. But the little girl you have been testifying was four or five years old was in the bed beside you? A. Yes, sir; she might have been younger; I don't know. Q. Mrs. Watson was in the adjoining room? A. Yes, sir. Q. Make any outcry when he crawled in bed with you? A. No, sir; because I was afraid to. Q. He hadn't done anything the other time when in bed with you? A. No, sir. Q. Why were you afraid? A. Because he told me I had better not tell it. Q. Then he got in bed; what did he do then after he got in bed? A. He had sexual intercourse. Q. Tell the jury what he did; what was you doing? A. That is the best I know how to tell it. Q. Well, you were laying on your back when he came in? A. Yes, sir. Q. When he come in you turned over on your stomach? A. Yes, sir. Q. Then he got in bed with you? A. Yes, sir. Q. What did he do? A. I told you once; I don't know how to tell it any different. Q. You were lying on your stomach? A. Yes, sir; I told you he turned me over. Q. That was the first thing he did? A. Yes, sir. Q. And he had sexual intercourse with you? A. Yes, sir. Q. Was that with or without your consent? A. I was scared and nervous, and I told him to go on out and let me alone, and he said he bet his farm or give his farm, I don't know which. Q. That it would not hurt you? A. That it would not hurt me. Q. He said that too? Well, how long did he stay in bed with you then? A. About a half hour, I guess, to the best I know. Q. Mrs. Watson was in the adjoining room; you didn't cry out? A. No, sir. Q. You knew if you did she would hear you? A. I was afraid to; I was scared and nervous. Q. That is what you said, you knew Mrs. Watson was in the adjoining bedroom.

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and you knew if you did she would hear you? A. I was afraid to. Q. You knew she would hear you? A. Yes, sir; but how did I know what he might do, he might, oh, what he might cut my throat, or no telling what; I didn't know what he might do. Q. He hadn't cut your throat before that time? A. No, sir; but I didn't know whether he would or not. Q. Is that the reason you didn't cry out? A. I was afraid to; I told you that. Q. How long was he in bed with you? A. I don't know; he was gone out I judge a half hour, probably a half hour. Q. How long was he in bed with you? A. I said it might have been a half hour, or shorter, I don't know. Q. Somewhere about a half hour he stayed in bed with you? A. I think so. Q. What did you do all that time? A. I told you once. Q. Had sexual intercourse for a half hour? A. Yes, sir. Q. How much of a struggle took place in that bed? A. I don't remember now. Q. And he turned you over on your back. Did he have to take hold of your limbs to pull them apart? A. I don't remember now whether he did or not. Q. Now to get this altogether straight, what was the first thing he said to you when he came in the room? You said in the first place to go out; then what did he say? A. He said no, it would not hurt me or amount to anything. Q. Did he say that before you said anything about it hurting? He said no; what did you say? A. I don't remember just word for word. Q. You told it before? A. I seen him standing there and I told him to go on out. He said no and commenced hauling at the covers and said it would not hurt me, he would bet his farm or give his farm. Q. Then what? A. I said yes, sir, I thought it would, and he said not. Q. Then what? A. I do not remember. Q. He said it would not hurt you; you said yes, you were afraid it would; and he said no, it would not, that he would bet his farm it would not; and you said yes it would—is that correct? A. Yes, sir. Q. Did it hurt? A. Yes, sir. Q. Then he was in bed with you about half an hour? When he left he went out the door; do you know where he went? A. No, sir; he went out the door. Q. And he came back again? A. Yes, sir. Q. Came back through the door the next time? A. Yes, sir. Q. Then got in bed with you again? Dressed the same as he was before? A. Yes, sir. Q. When he came back in he came in through the door? How do you know he came in through the door? A. Because I seen him. Q. Was you awake or asleep? A. I know he came in that way. Q. You say you saw him? A. Yes, sir. Q. Were you awake or asleep? A. I was dozing. Q. You were dozing? A. Yes, sir. Q. If you were dozing how did you see him come through the door? A.

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Because I opened my eyes and seen him. Q. Did you doze off to sleep, did you go to sleep after he was there the first time? A. I was just dozing off. Q. You were just dozing off? A. Yes, sir. Q. Didn't you testify at the preliminary hearing that you dozed off to sleep? A. Yes, sir; but I might have been mistaken. Q. What do you say now? A. I dozed off to sleep. Q. Oh, you dozed off to sleep? A. Yes, sir. Q. You dozed off to sleep, and yet you say you saw him come in through the door? A. Yes, sir. Q. Then he came to your bedside and you told him to go away; he said no; you said yes; he said no, he said it would not hurt you; you said it would, and then what did he say after that? A. He said no, he knew it would not, and he said I had better not tell any of it at all. Q. Then he said you had better not tell it? A. Yes, sir. Q. Why did he say that? A. I don't know anything about it. Q. Had you said anything about telling it? A. No, sir; but he told me that all the time. Q. He got in bed with you the second time? A. Yes, sir. Q. Was you lying on your back that time? A. I don't remember; yes, sir, I believe so. Q. You turned over on your stomach again? A. No, sir. Q. You didn't the second time? A. No, sir; because I was scared and nervous. Q. How long were you discussing the question the first time of whether or not it would hurt you? A. I don't know how long it was. Q. You were too scared to discuss that? A. I just woke up and I was scared of course. Q. Did you get up and lock the door after he was in there the first time? A. No, sir. Q. Why didn't you? A. I don't know. I didn't do it. I didn't lock the door. Q. How long did he stay in bed with you the second time? A. About the same time. Q. About a half hour? A. About the same time. Q. About a half hour? What did he do in bed with you about a half hour? A. Did the same as he did the other time. Q. Sexual intercourse for half an hour again? A. Yes, sir. Q. How many times did he have sexual intercourse with you that night? A. Twice. Q. And half an hour each time; that is true, is it? A. Yes, sir. Q. Well, after he went out the second time, did you get up and lock the door? A. No, sir. Q. Mrs. Watson was sleeping in this next room all the time? A. Yes, sir. Q. And the little girl slept beside you in the bed? A. Yes, sir. Q. That is the first time he had ever had sexual intercourse with you, you are absolutely positive of that? A. Yes, sir; I am. Q. Was that the last time? A. Yes, sir. Q. What time did you get up in the morning? A. Pretty early; yes, Mr. Morgan and his brother came over there to load the potatoes early. Q. That he had gotten of Mr. Watson? A. Yes, sir. Q. Now, was the

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bed stained the next morning. A. No, sir; not that I noticed. No, sir; it wasn't. Q. Was any of your night clothes stained in any way? A. Not that I remember of now. Q. No hemorrhage or bleeding of any kind? Q. Did you answer the question? A. Yes, sir. Q. What did you say? A. I said no. Q. That was the first time any man ever had sexual intercourse with you? A. Yes, sir. Q. Now, after this occurrence when was the next time you were over at Watson's? A. After the 14th? Q. Yes. A. I don't remember. Q. You don't remember when you were over there after that? A. I might have been one or two times. Q. You went to an entertainment at Red Hill schoolhouse with the Watsons? A. Yes, sir; and ma and sister went with us. Q. You rode in the wagon with the Watson family just the same as going to the supper? A. We all rode in the wagon. Q. When was the first time you ever told anybody about this? A. The 30th of August. Q. The 30th of August, 1906; you say this last time occurred on the 14th of January, and you never told anybody about it until the 30th of August? A. Yes, sir. Q. You had been pregnant about seven months about that time, hadn't you? A. I guess so. Q. It was so that it was quite perceptible, wasn't it? A. Yes, sir. Q. And it got to where you could not conceal it any longer and you told your mother about it? A. She asked me, and I told her. Q. Did you ever tell Watson anything about it—that you were in a family way? A. No, sir; I never did. Q. That you were in a family way, until you filed the action? A. No, sir."

To my mind the mere reading of the foregoing recital is sufficient and ought to convince any reasonable man that there was absolutely no conduct took place in the bed with the plaintiff that night which would constitute her forcible and violent ravishment. When asked as to how much of a struggle took place in the bed, she stated merely, "I do not remember." And when asked as to whether or not defendant took hold of her limbs to pull them apart, she again stated, "I do not remember." Yet her duty is to resist to her utmost, and the burden of proving this is upon her. And when interrogated on the very essential proposition involved in this case as to whether or not the act was committed with her consent, she did not answer it but evaded the question and said, as is seen above, "I was scared and nervous and told him to go on out and let me alone," and then manifestly consented.

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It is her duty to resist; the act of rape, under her petition and the instructions of the court, could not be consummated except by the defendant overcoming her resistance. No resistance, no rape. Resistance means to fight back, not to quietly and submissively yield; or, as is said by Ryan, C. J., in *State v. Welch*, 37 Wis. 196, "resistance is opposing force to force, not retreating from force." And not only must the resistance be made, but it must be made to the utmost of her capacity, for the court's instruction was that if the "plaintiff submitted to the embraces of the defendant, while she had the power to resist, however reluctantly she may have yielded, such submission deprives the act of an essential element of rape." "Utmost" is defined by Webster to be: "The most possible; the farthest limit; the greatest power, degree, or effort." The plaintiff pleaded in her petition that by force and violence she was ravished, went into the trial of the case upon that issue, and then testified to facts which demonstrate to my mind beyond any reasonable doubt that there was no force and violence whatsoever used, or, if so, that she made absolutely no resistance.

I have examined a great number of cases involving the same question as here, and I have yet to find a report of any case with facts even approaching those shown by this record being sustained by any court as constituting the crime of rape. As I view it, the record is totally and absolutely devoid of any evidence whatsoever of force, violence, or resistance.

The definition of the word "force," according to Webster, is as follows:

"Power, violence, compulsion, or constraint exerted upon a person or thing; strength or power, of any degree, exercised without law, or contrary to law, upon persons or things; violence."

"Violence" is defined by Webster as follows:

"Strength or energy actively displayed or exerted; vehement or forcible action; force; impetuosity; vehemence; of persons, vehement or unrestrained eagerness; highly excited or animated force or energy."

It is a misnomer, it is a misapplication of those terms, it is a violation of the fundamental, common, ordinary meaning the English-speaking people apply to those words, for a court to say

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that that which plaintiff in this case says took place constituted ravishment by force and violence. No reliance whatever is made upon any threats having been made by the defendant against the plaintiff, so that she was in no wise intimidated. All she says defendant said to her is set out above, and of course does not show any threat. The evidence in this case not only contains no support for the claim, but it affirmatively shows that none existed. Necessarily one would assume, if a female is forcibly ravished, her virtue stolen, and left in the mental condition that a decent female would be under those circumstances, that rest and sleep would be out of the question for at least the balance of that night. The ravisher would have murdered innocent sleep and left her distraught and wrought to the point of distraction. But not so in the present case. This woman, of more than ordinary strength, size, and weight, says she peacefully dozed off to sleep after having been subjected to thirty minutes of forcible ravishment, and when her despoiler once more appeared at her bedside to repeat it, instead of screaming, fleeing, or fighting, she calmly and quietly told him to go away. And then once more admitted him to her bed, and again permitted herself to be forcibly ravished for another half hour, and the little child which slumbered by her side, and the other children in the same room, and the wife in the adjoining room, were undisturbed by her efforts to protect her virginity. The bed was not stained, nor apparently disarranged, nor were her clothes stained in any way, nor did the ferocity of the attack result in any hemorrhage whatsoever; nor did either of them bear any marks of the combat. She arose the next morning, commingled with the plaintiff and his family, and her appearance apparently excited no comment on their part; nor did she complain to his wife, children, associates, or anyone else of all the world until seven months later, when on the 30th of August, beginning to show signs of pregnancy, for the first time she told her mother. I challenge the annals of jurisprudence to supply another case of similar character, or one where the facts even approach those admitted in the case at bar, where a judgment civil or criminal has been sustained. The undisputed facts exist and a righteous judgment stand. It shipwrecks logic, rea-

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son, and law to permit a judgment of this character on this evidence to be affirmed. I do not place this dissent upon precedent or authority, for I deem that I need not; but there are cases by the score where the facts are stronger than these, and appellate courts have done that which in every case they should do when there is no evidence to support a verdict—declined to affirm it. Nearly all cases of rape are criminal in their character. The evidence of the force, violence, and resistance must be established to the satisfaction of the jury beyond a reasonable doubt; but after it is established beyond a reasonable doubt, it is no more nor less than the evidence of force and resistance. Hence, the grade of proof required in no wise touches the question in this case; while they are too unreasonable for me to give them any credence whatever, the things to which this woman testifies are assumed to be absolutely established not only beyond a reasonable doubt, but beyond every doubt—they are assumed to be simply true, and the position I take is that, being so established, there is no evidence of rape.

The facts in the case of *State v. Cowing*, 99 Minn. 123, 108 N. W. 851, 9 Am. & Eng. Ann. Cas. 566, disclose the following:

"He was a farmer, forty-nine years of age, and had a family of seven children, including his oldest son, twenty-two years of age. He was never before accused of any crime, and had lived continuously for many years on a farm adjoining the farm of the father of the complaining witness. The houses were about three-quarters of a mile apart. Apart from some trouble with rheumatism, the defendant was a man of at least ordinary strength and weighed about one hundred sixty-five pounds. The complaining witness was unmarried, twenty-three years of age, had done the usual work of a girl on the farm, was about five feet tall, and weighed about one hundred pounds. The testimony, read in the light of the trial court's memorandum, tended to show, but not satisfactorily, that she had not the average mental endowment, nor ordinary physical strength, and that she had suffered from continued ill health. The complainant's version is that when she was in the kitchen defendant came in softly 'and grabbed me with my arms tight back of me and said, "Lizzie, we are going to have some fun." I said, "No, I don't want no fun," dragging me. After I said I didn't want any fun, he grabbed me with both arms again. When he grabbed me the

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first time I was standing by the stove with my back toward the door. When he grabbed me the second time I was standing the same way. Then he jerked me around, my face to the east and my arms back of me, and grabbed me tight, dragging me out of the kitchen in through the door into the front room south of the kitchen. While he was dragging me I tried to fight and get away as hard as I could, and screamed and hollered as loud as I could. I said for him to leave me alone, let go of me, but he dragged me in farther and threw me on the couch with my arms under me and threw me on my hands. I don't know how large the couch is. Then he kicked his left knee below my chest and pressed me down, and grabbed with his left hand into my throat and choked me as hard as he could, and with his right hand he rushed up my clothes so quick, and then he had sexual intercourse with me. It caused me to flow blood all over my skirt. I see him when he got off me. There was blood on his right hand, across his fingers, and across the whole length of his hand. This intercourse caused me pain. My throat was sore, and I was lame all over. It caused me pain when he was doing this. My head ached. It hurt me at the time he was doing this hard, just as though some one was running a knife through me and tearing me all to pieces. I did not in any manner consent to that intercourse. I was not willing that he should have it with me. I tried just as hard as I could to get away. After he did this he went right off. When he got off my person he rushed his clothes right up quick with both hands and then went right out."

Discussing these facts, the court said:

"The principal question presented by the record concerns the sufficiency of the testimony of the prosecutrix to show the degree of resistance to the assault charged which the law requires. That degree, in the nature of things difficult of determination, has been the subject of much legal controversy. * * * In the case at bar there is no lack of testimony to the conclusion that the prosecutrix did not consent, but there is little other evidence in this regard. She says she tried to fight and get away just as hard as she could while he was dragging her, but there is no specific act of resistance testified to after she was carried to the couch. She does not say that she employed the instinctive devices of self-defense; for example, she does not say that she crossed her legs or tried to keep them together. There is no evidence that she used the natural means of offense. While the defendant's left knee was below her chest and he was pressing her down and held her throat with his right hand, as she testi-

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fies, it might well be that she could not have taken her arms out from under her body; but it is unexplained why she did not free one arm at least when he was in the position he must afterwards have assumed to have accomplished his purpose. Not only is she not shown to have used or tried to use her hands, but there is no testimony that she used or tried to use her body, legs, or any other ordinary means of reprisal. Neither the victim nor the perpetrator appear to have borne any bruise or mark resulting from the struggle. There is confused testimony that one of her skirts was slightly torn; but no evidence that her clothing had been touched or torn. Nor does the record show any threats or intimidation on the part of the defendant, or any intent on his part to use any means necessary to accomplish his purpose, nor any reasonable ground for apprehension of bodily harm, nor such a place or position of the prosecutrix as would have rendered resistance useless. It would seem that the only theory upon which her testimony is sufficient to show resistance is that ordinary means of self-defense were precluded by her mental condition. The record does not show her collapse or unconsciousness. The only evidence on this point is in her cross-examination. She was asked whether she had not testified on the preliminary examination to a series of statements, including at the end the following: "And pretty soon he threw up my clothes in a rush. My mind was gone so that I didn't know what he was doing. So pretty soon he got his privities into me as hard as he could, and mauled it around as hard as he could." "Did you so testify?" She answered that she "did not testify that way the first time. Not the last part, I didn't." The reporter who took the minutes of the testimony on the examination before the magistrate swore that she did so testify. Moreover, her own testimony on trial, previously referred to, was not consistent with the denial. For present purpose it is proper to consider this testimony most favorably to the prosecutrix; but, in allowing the testimony as to her mental condition to remain, it is to be borne in mind that there exist contradictions as to her statement of her own analytical consciousness at the time of the act. Her testimony reveals a clear memory and close observation as to what happened immediately before and immediately after the act complained of. She heard him tear her skirt, which, in the trial, she said did not tear very easily, and as to which, on the preliminary examination, she testified: 'It tears very easy.' The tear did not make very loud noise, but she heard it tear. 'I don't mean his little finger.' She had previously testified that her hearing was reasonably good. After the act she said 'there was

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blood on his right hand, across his fingers, and across the whole length of his hand.' Immediately afterwards she testified that the accused left. She then saw cows break out and came up towards the house where there was a line of fancy clothes, and she didn't want them to chew them, so she went out as far as the porch and set the dog on them; but she didn't run, she 'just wiggled out that far.' This testimony tends to corroborate that of the defendant as to the same incident. Taking the testimony as a whole it creates more than a grave doubt whether either resistance or a state of mind excusing the failure to resist was shown. It is apparent that upon a new trial the testimony of the prosecutrix could be made more definite as to the specific acts of resistance and as to the condition of her will at the time of the alleged outrage. The proof as to her mental and physical condition at that time, now inadequate and leaving much to conjecture, is susceptible of being properly made more certain. See *State v. Peterson*, 110 Iowa, 647, 82 N. W. 329. It must occur that the circumstances of outrages such as this is alleged to have been are not so nearly identical that a decision on one state of facts can be regarded as determining another controversy. We are especially referred to *Spaulding v. State*, 81 Neb. 289, 85 N. W. 80, and *Baer v. State*, 52 Neb. 655, 81 N. W. 656, as containing judicial sanction of a conviction upon the facts similar to those at bar. In the case first named, the court, commenting on the absence of resistance as would usually be expected, sets forth, among other things, that the prosecutrix struck the defendant, leaving a mark on him visible for some time thereafter, that he admitted receiving a blow from her, and that her testimony as to becoming unconscious was in a degree corroborated by other witnesses. In the last named case, the prosecutrix testified that in the struggle she was dragged around the floor several times, despite her most agonizing appeals to the defendant and to God. She was scratched, bruised, and her clothes torn, and made complaint immediately. There was also evidence of intimidation and of threats to kill."

See, also, *Livinghouse v. State* (76 Neb. 491) 107 N. W. 854.

To the same effect is the early case from the Supreme Court of Nebraska, *Oleson v. State*, 11 Neb. 275, 9 N. W. 39, wherein Chief Justice Maxwell, who prepared the opinion, quoted approvingly from the following authorities, as follows:

"In the case of *People v. Morrison*, 1 Parker Cr. Rep. 625, it is said, to constitute the crime there must be unlawful and

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carnal knowledge of a woman by force, and against her will. * * * The prosecutrix, if she was the weaker party, was bound to resist to the utmost. Nature had given her hands and feet with which she could kick and strike, teeth to bite, and a voice to cry out; all these should have been put in requisition in defense of her chastity. In *The People v. Behring*, 69 N. Y. 374, it is held that 'in order to constitute the crime of rape of a female over ten years of age, when it appears that at the time of the alleged offense she was conscious, had the possession of her natural mental and physical powers, was not overcome by numbers or terrified by threats, or in such place or position that resistance would have been useless, it must also be made to appear that she did resist to the extent of her ability at the time, and under the circumstances.' In the case of *People v. Benson*, 6 Cal. 221, it is said: 'That there was no outcry, though aid was at hand, and the prosecutrix knew it; that there was no immediate disclosure; that there was no indication of violence on her person, and that the act was committed at a time and under circumstances calculated to raise a doubt as to the employment of force, are put as strong circumstances of defense, not as conclusive, but as throwing a doubt upon the assumption that there was a real absence of assault.' In *Whitney v. The State*, 35 Ind. 506, the court say: 'In prosecutions for this crime the best judges of ancient and modern times have laid down certain tests by which to be governed in ascertaining the truthfulness of the party preferring the charge. They concur in saying that her evidence should be carefully considered; and if the witness be of good character; if she presently discovered the offense, and made search for the offender; if the party accused fled for it; these and the like are concurring circumstances which will give greater probability to her evidence. But on the other hand, if she be of evil fame, and stand unsupported by the testimony of others; if she concealed the injury for any considerable time after she had an opportunity to complain; if the place where the act was alleged to have been committed were such that it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong but not conclusive presumption that her testimony is false or feigned.'

In the case of *Brown v. State*, 127 Wis. 193, 106 N. W. 536, 7 Am. & Eng. Ann. Cas. 258, the facts are stated as follows:

"The information alleged that 'on the 27th day of October, in the year 1904, at said county, Grant Brown did ravish and carnally know one Edna Nethery, a female of the age of fourteen years and more, by force and against her will and against the

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peace and dignity of the state of Wisconsin.' The two parties were children of neighboring farmers who had known each other all their lives. The accused was twenty years old, the prosecutrix sixteen. Within the year before the event they had been thrown to some extent in company at social gatherings, at one of which at least had occurred direct personal contact in some games described as involving 'kissing forfeits.' On October 29, the prosecutrix went by a usual path across fields to her grandmother's house for the purpose of having an aunt try on certain clothing being made for her. Such path passed by and over parts of the farm of defendant's father. Defendant was in the field driving out hogs and repairing a fence, and, as prosecutrix reached a stile, he was close thereto, so engaged. She addressed him in a playful way with reference to his work, and he suspended the same and came up to her. Her story is that he at once seized her, tripped her to the ground, placed himself in front and over her, unbuttoned her underclothing, then his own clothing, and had intercourse with her; that the only thing she said was to request him to let her go, and, throughout the description of the event, her only statement with reference to her own conduct was, repeatedly: 'I tried as hard as I could to get away. I was trying all the time to get away just as hard as I could. I was trying to get up; I pulled at the grass; I screamed as hard as I could, and he told me to shut up, and I didn't and then he held his hand on my mouth until I was almost strangled.' Also that at one time she got hold of the fence to try to pull herself away. Whenever he removed his hand from her mouth she repeated her screams. She denies any recollection as to the position of her limbs at any of these times, or where his were with reference to herself. She confined her statement of the force used by him to the actual sexual penetration. She makes no mention of any use of her hands or her lower limbs. After the completion of the intercourse she says he made her promise not to tell, and, upon her doing so, allowed her to arise. She says she made the promise because she was afraid of him, and did not know what he would do if she did not. Thereupon she proceeded to her grandmother's house, something more than a quarter of a mile, but, before entering the house, went into a shed, slightly off her direct course, to arrange her underclothing. There she discovered flow of blood, and, as she states, became frightened and rushed into the house of her aunt, where she at once exclaimed: 'Grant Brown has (done something) to me. O! What shall I do?' Whereupon the aunt immediately took her home and informed her mother. She was taken to the family physi-

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cian for examination, who, however, postponed it until the next day, when, in company with another physician, a physical examination was made, disclosing fresh rupture of the hymen and a condition of the genital parts indicating recent sexual intercourse, but not significant as to whether the same had been accomplished forcibly or otherwise. Her person nowhere showed any bruises or injuries, nor did her clothing, except for a rip about an inch long in her drawers. At this examination she stated to one of the physicians that she had not resisted or made any fight. The defendant's story differed only in some details and in the denial of any resistance, asserting that when she came where he was at work and addressed certain playful remarks to him he approached her, placed his arm about her and indulged in certain liberties with her person, to which she offered no resistance, whereupon he laid her down and had intercourse with her, she at no time making any resistance or outcry. There were no marks upon his face, hands or clothing of any struggle. Accused (*sic*) was a well-matured girl for her years, weighing 117 pounds. About a week before the event she had been ill with measles for four or five days, and made some suggestion that she had not fully recovered her strength on October 29th. Defendant's physical characteristics are shown only to the extent that he weighed 150 pounds, and had been brought up on a farm doing farm work."

Discussing the case, the court said:

"Not only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offense is consummated. We need not mention the exception where the power of resistance is overcome by unconsciousness, threats, or exhaustion, for, in this case, there is no proof of any of those things. Further, it is settled in this state that no mere general statements of the prosecutrix involving her conclusions, that she did her utmost and the like, will suffice to establish this essential fact, but she must relate the very acts done, in order that the jury and the court may judge whether any were omitted. *Bohlmann v. State*, 98 Wis. 617, 74 N. W. 343; *Devoy v. State*, 122 Wis. 148, 29 N. W. 455. Turning to the testimony of prosecutrix, we find it limited to the general statement, often repeated, that she tried as hard as she could to get away. Except for one demand, when first seized, to 'let me go,' and inarticulate screams, she mentions no verbal protests. While we would reasonably recognize the limitations resting on many people in attempting expression and description, we can-

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not conceive it possible that one whose mind and exertions had, during an encounter of this sort, been set on resistance, could or would in narrative mention nothing but escape or withdrawal. A woman's means of protection are not limited to that, but she is equipped to interpose most effective obstacles by means of hands and limbs and pelvic muscles. Indeed, medical writers insist that these obstacles are practically insuperable in absence of more than the usual relative disproportion of age and strength between man and woman, though no such impossibility is recognized as a rule of law. 3 Wharton & S. Med. Jur. secs. 172, 188, and authorities cited; 1 Beck, Med. Jur. 203. In addition to the interposition of such obstacles is the ability and tendency of reprisal, of counter physical attack. It is hardly within the range of reason that a man should come out of so desperate an encounter as the determined normal woman would make necessary, without signs thereof upon his face, hands, or clothing. Yet this prosecutrix, of at least fair intelligence, education, and ability of expression, in her narrative mentions no single act of resistance or reprisal. It is inconceivable that such efforts should have been forgotten if they were made, or should fail of prominence in her narrative. The distinction between escape and resistance is admirably discussed by Ryan, C. J., in *State v. Welch*, 37 Wis. 196, 201. Resistance is opposing force to force (Bouvier), not retreating from force. These illustrations but serve to point the radical difference between the mental conception of resistance and escape and emphasize the improbability that if the former existed only the latter would have been mentioned. This court does not hold, with some, that, as matter of law, rape cannot be established by the uncorroborated testimony of the sufferer, but, in common with all courts, recognizes that, without such corroboration, her testimony must be most clear and convincing. Among the corroborating circumstances almost universally present in cases of actual rape are the signs and marks of the struggle upon the clothing and persons of the participants, and the complaint by the sufferer at the earliest opportunity. In the present case the former is absolutely wanting, for the one-inch rip in prosecutrix's underwear was not shown to be of a character or location significant of force or violence. Not a bruise or scratch on either was proved, and none exist on prosecutrix, for she was carefully examined by physicians. Her outer clothing not only presented no tearing, but no disarray, so far as the testimony goes. When one pauses to reflect upon the terrific resistance which the determined woman should make, such a situation is well-nigh incredible. The significance of the other corrobora-

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tive circumstance, that of immediate disclosure, is much weakened in this case by the fact that prosecutrix turned from her way to friends and succor to arrange her underclothing and there discovered a condition making silence impossible. Such facts cannot but suggest a doubt whether her encounter would ever have been disclosed had not the discovery of blood aroused her fear that she was injured and must seek medical aid, or at least that she could not conceal from her family what had taken place. Nor is this thoughtfulness of the disarrangement of her clothing consistent with the outraged woman's terror-stricken flight to friends to give the alarm and seek aid which is to be expected. We are convinced that there was no evidence of the resistance which is essential to the crime of rape, and that the motion for new trial should have been granted on that ground."

In the case of *Price v. State*, 36 Tex. Crim. App. 143, 37 S. W. 743, from the Court of Criminal Appeals, the prosecutrix detailed the facts as follows:

"When we had gone into the Tatum pasture, and gotten about a mile or a mile and a half of my father's house, the defendant caught my horse by the bridle, and said: "We want to stop here." He got off of his horse on the left side, and caught hold of me, and pulled me off on the left side of my horse. He was riding on the right side of the road, and I on the left, going north. When he pulled me off my horse, while I was begging and crying, he pulled out a pistol, and said for me to quit, or he would kill me. He laid it down by us. He caught both of my hands in one of his, and held both in that way until he did what he wanted to. He pulled up my clothes, and raped me. His male organ penetrated my female organ. I did all I could to keep him from raping me. I begged him, and, while he held my hands in one of his, I shoved him as well as I could with my arms. I did not kick or scratch him. He was not bruised or scratched, as far as I know. My drawers were torn down one leg. He told me, if I told on him, he would kill my father.' The prosecutrix testified that she went on home, appellant accompanying her, and that they arrived there a little before her sister and Mr. Maltby came; that she slept with her sister that night, and said nothing about it. Said nothing to her people the next morning, and did not mention the matter until in August following, and then she mentioned it only when her sister remarked that something was the matter with her, and she then told her about the rape that had occurred in the pasture, some seven months previous. Her excuse for not telling sooner

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was, because the defendant threatened to kill her father if she did, and that he was a dangerous man, and she was afraid of him."

The court, discussing the case, said:

"In this case, however, instead of only three months elapsing between the alleged offense and the complaint made by the prosecutrix, more than seven months had elapsed, and only when her condition exposed her did she state anything in regard to the matter. This long silence and the circumstances under which she made the accusation should go very far to discredit her, and to suggest that the act of carnal intercourse, if it was with the defendant at all, was with her consent. The excuse she gives, that she feared the appellant would kill her father, under the circumstances of this case, must appear very flimsy indeed. The appellant was shown not to live in the family, and not to have any authority or control over her; and this statement of hers, as a reason for her long silence, does not comport with the integrity of a virtuous female, who has been outraged, and who is jealous of her honor. If we look to the circumstances of the outrage itself as narrated by her, they likewise appear shadowy. There was no attempt at flight, though she was on horseback. No evidence of any injury or struggle. She appears to have unresistingly submitted to being lifted from her horse, and, after the outrage was accomplished, to be lifted back again, by the destroyer of her innocence, to have accepted his escort to her home, and to have gone with him on two sleigh rides a few days afterwards; and all this without any suggestion that he had demeaned himself towards her in any other wise than a manner which met her approval. Under all of the facts of this case, it occurs to us that the lower court should have unhesitatingly granted a new trial in this cause. Although a stricter rule prevails here with reference to a new trial than in the lower court, yet, from the record in this case, we cannot permit this verdict to stand."

The foregoing cases, while all criminal in their character, present no different legal situation, aside from the result of the verdict, than the case at bar. Both civil and criminal prosecutions for rape involve proof of the same elements. One must be proven by a preponderance of the evidence, and the other beyond a reasonable doubt. In the case at bar I assume that the evidence of the prosecutrix is absolutely true, and, so assuming, feel that the same judgment should follow in this case as

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was rendered in the civil rape case of *Robinson v. Musser*, 78 Mo. 153, which is, *volenti non fit injuria*."

The foregoing are but a few cases of which scores may be found where appellate courts have refused to allow verdicts to stand where the evidence was infinitely stronger on the part of the prosecution than in this case, and I have never found one which in weakness has even approached it that has been challenged and sustained. There was evidence offered, as indicated in the opinion of the court, that the plaintiff was of previous chaste and virtuous character, and hence that, even though she consented, rape was committed and she should recover; but it is to be observed that the defendant had no notice of any such charge being made against him. It was not averred in the petition, the case was not tried upon such theory, the court did not instruct upon it, and the defendant was given no opportunity to defend on that ground. I believe that this is the ground this case should have been based upon; that plaintiff should have charged defendant with having had intercourse with her, that she was not his wife, was of the age of seventeen years, and of previous chaste and virtuous character; and substantial justice herein requires that the case be returned and tried upon that ground. If this defendant had intercourse with the plaintiff, though with her consent, and she is of previous chaste and virtuous character, the punishment inflicted upon him herein is wholly inadequate. He should not only be made to suffer civilly, but his act constituted a crime for which the state ought to proceed against him; but in whatever form his punishment comes, it should be according to the law. If we convict guilty men by methods which ignore the law, and its demands, we make it easy to convict innocent men in the same way. If a guilty man can be convicted without evidence, so may an innocent one, and this is the rank danger which lurks in the affirmance of this judgment. I make no claim to being a prophet, but the conclusion reached in this case will be departed from some day. It will not do to say that a man may be convicted of forcible rape on the uncorroborated evidence of a female who weighs one hundred thirty-five or forty pounds, in full possession of all her faculties, right

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in the heart of his family, with them all around him and undisturbed, when she does not fight, yell, nor complain. Such a holding repeals the statute.

Hence, I feel in this case a judicial crime is being perpetrated, and that this man is being stripped of his property in defiance of and contrary to law.

I. ODWICK LUMBER CO. *et al.* v. E. A. BUTT LUMBER CO.

No. 1744. Opinion Filed April 15, 1913.

(131 Pac. 917.)

1. **SALES—Place of Delivery.** In the absence of any contrary provision in a contract of sale, the place of delivery is the place where the goods are located when sold, and that, too, whether they are actually or only potentially there.
2. **SAME—Action for Price—Evidence of Delivery.** Where property is to be delivered at the place where it is located at the time it is sold, the seller, before he can recover his pay, is bound to prove delivery at that place.
3. **SAME—Contract—Place of Delivery.** Plaintiff, a lumber company with its mills at A., contracted to sell and deliver to defendant, a lumber company with its yards at W., a car of lumber. **Held,** the contract being silent upon the subject, that the place of delivery is upon the car at A.
4. **SAME—Performance.** Where defendant, a lumber company with its yards at W., ordered of plaintiff, a lumber company with its mills at A., a car of lumber to be delivered at that place, **held,** that defendant was not bound to accept delivery of the lumber from another lumber company at another place.

(Syllabus by the Court.)

Williams, J., dissenting.

Error from District Court, Garvin County;
R. McMillan, Judge.

Action by the Lodwick Lumber Company and the Atlanta Lumber Company against the E. A. Butt Lumber Company, composed of E. A. Butt and I. A. Lewis. Judgment for defendants, and plaintiffs bring error. Affirmed.

Blanton & Andrews, for plaintiffs in error.

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Geo. I. Jordan and J. B. Thompson, for defendant in error.

TURNER, J. On March 2, 1908, in the district court of Garvin county, the Lodwick Lumber Company, a corporation, sued E. A. Butt and I. A. Lewis, partners as E. A. Butt Lumber Company, for a sum certain, the agreed price of a car of lumber which defendants had refused to accept. Later, by leave of court, it filed a second amended petition, in which Atlanta Lumber Company joined as a party plaintiff. Said petition substantially states: That plaintiffs are corporations engaged in the manufacture and sale of lumber at certain points in Texas; that defendants are engaged in the sale of lumber in Wynnewood and Paoli, in Garvin county, Okla. That while so engaged defendants sent plaintiff Atlanta Lumber Company this telegram:

"Wynnewood, I. T. 10—28—07. Atlanta Lbr. Co., Atlanta, Tex. Quote car 12 inch No. 3 boards 27 rate, E. A. Butt Lbr. Co."

To which Atlanta Lumber Company answered by telegram:

"Oct. 29, 1907. To E. A. Butt Lbr. Co., Wynnewood, I. T. 14.50 20 cent rate 12 inch No. 3. Atlanta Lbr. Co."

And to which E. A. Butt Lumber Company replied:

"Wynnewood, I. T. 10—30—07. Atlanta Lbr. Co., Atlanta, Tex. Ship car No. 3 boards to Paoli. Rush. E. A. Butt Lbr. Co."

That by the words in the telegram, *supra*, which read, "14.50 20 cent rate," it was intended by the parties in interest that the lumber would be billed to defendants at the invoice price of \$14.50 per thousand, and that in settlement therefor defendants might deduct from said price twenty cents per hundredweight for all the lumber contained in the car. That the freight rates upon a car load shipment of lumber from Atlanta and Lodwick to Paoli were, at that time, and are the same. That pursuant to said contract, the next day the Atlanta Lumber Company, at Atlanta, Tex., directed the Lodwick Lumber Company, at Lodwick, Tex., to ship to defendants the car of lumber so ordered. That acting thereon said company prepared the same for shipment and loaded it on board car at Lodwick and delivered it to the Texas Southern Railroad Company for transportation to defendants at Paoli, then Indian Territory, as so directed, and also sent invoice

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and bill of lading. That said lumber was of the value of \$376.64, for which, under the terms of the contract, plaintiffs are entitled to recover \$220.04. And it prayed judgment for that amount.

For answer, after general denial, defendants, in effect, admitted the contract with Atlanta Lumber Company to be as alleged, and charged that, without their knowledge or consent, the Atlanta Lumber Company had turned over the order for the lumber to the Lodwick Lumber Company, its coplaintiff; that they had never at any time had a contract therefor with that company, and did not know that said order had been turned over to the Lodwick Lumber Company prior to their telegram to Atlanta Lumber Company canceling the order; that immediately upon receipt of the bill of lading therefor defendants returned the same to Lodwick Lumber Company and refused, and still refuse, to accept the lumber, on the ground that no contract existed between them and the Lodwick Company with reference thereto, and ask to be discharged, etc. After reply filed, in effect a general denial, there was trial to a jury and, at the close of plaintiffs' testimony, a demurrer to the evidence, which was sustained, and judgment for defendants rendered and entered upon a directed verdict, and plaintiffs bring the case here, assigning that the court erred in sustaining the demurrer.

There is no conflict in the testimony. To maintain the issues on the part of plaintiffs, the Atlanta Lumber Company, after introducing in evidence the three telegrams set forth in the petition as constituting the contract, proved: That on the day of the sending of its answer quoting the price of lumber, and before receiving defendants' telegram, *supra*, in reply thereto, it wrote to defendants at Wynnewood thus:

"We are today in receipt of your telegram as follows: 'Quote car twelve inch boards, twenty cent rate.' We have quoted you as follows: 'Fourteen fifty twenty cent rate No. three. * * *'"

That in reply to said telegram, and evidently before receiving said letter, defendants wired: "Ship car No. 3 boards to Paoli Rush"—as stated, and on the next day wrote the Atlanta Lumber Company thus:

"We wired you to ship 1x12 No. 3 boards to us at Paoli, I. T., as per price made in message. We are wanting an especia-

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quick shipment on this car and will appreciate it if you will get it out quick."

That on the same day the Atlanta Lumber Company wrote the Lodwick Lumber Company:

"We are herewith inclosing you telegram ordering car of No. 3 boards for E. A. Butt Lbr. Co., Paoli, I. T. Our quotation was \$14.50 on 20c. rate, being \$16.25 on 27c. rate which rate applies. You will invoice direct to E. A. Butt Lbr. Co. at Wynnewood, and credit us with \$5.00. * * * (Have written them you held the order, and you would handle direct to them as quick as car could be had.)"

Whereupon that company proceeded to load the car, and while so doing the Atlanta Company received from defendants a letter, dated November 4, 1907, which read, "Please cancel our order for No. 3 boards as we want a quick shipment and we asked for a price delivered on 27c. rate and suppose message was copied wrong to you," and at once telephoned the Lodwick Company, 45 miles away, to cancel the order, but which was not done, for the reason that by that time the car was loaded; whereupon, and upon being so informed, the Atlanta Company wired defendants, "Number three boards loaded car twenty one six fifty seven can't cancel," and on the same day wrote them:

"We have yours of November 4th, requesting us to cancel your order for car of twelve-foot boards. We immediately phoned the mill, and they advised us this order had already been loaded in car K. C. S. No. 21657. Therefore, we wired you giving car number, and advised we could not cancel, which we now beg to confirm. They will forward invoice & B—L promptly."

The same day defendants wrote the Atlanta Company:

"Your message recd. We had reordered car No. 3 boards but have asked the mill to cancel and if not shipped they of course will do so, but we will only accept this car delivered on 27c. rate at \$14.50 the price you quoted. As we asked prices by wire of several mills and all of them yours included delivered on a 27c. rate."

The next day that company answered defendants thus:

"We have yours of the 6th regarding car of No. 3 boards. and will state that we quoted you in our telegram on a 20c. basis and following it up by our letter. We also affirmed it on 20c. basis and not \$14.50 on 27c. rate. We refer you to our letter and

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telegram of October 29th, quoting you price. We mailed this order direct to the Lodwick Lbr. Co., on the same basis, and they 'phoned us yesterday, at the time we sent you telegram giving car number, that this car was loaded, and is no doubt now well on its way towards destination. We also wrote you on the 31st ult. that we had placed this car with the Lodwick Lbr. Co., Lodwick, Texas, and if you had occasion to refer to the order to write these people. We are sorry that we were unable to cancel the order, but as stated above." (There is a total lack of other evidence as to the existence or contents of said letter of the 31st ult.)

When defendants refused to accept and pay for the lumber, this suit was brought. When, on October 28, 1907, defendants wired the Atlanta Lumber Company, "Quote car twelve inch No. 3 boards 27 rate," the Atlanta Company should have wired back a quotation as requested, or not at all. Instead of so doing it wired, "\$14.50 twenty cent rate 12 inch No. 3," and followed it up that same day with a letter reciting the message. As the twenty-cent rate thus offered was \$1.75 higher to defendants on the 1,000 feet than the 27-cent rate inquired about, defendants need not have made the order; but when, before receiving the letter, they did so by sending a reply to said message, which read: "Ship car No. 3 boards to Paoli. Rush"—the minds of those parties met in the contract of sale set forth in the petition as evidenced by the three telegrams. As there is neither allegation nor proof that the Atlanta Lumber Company, in making this contract, was acting for the Lodwick Lumber Company as its undisclosed principal, or that the contract when made was assigned by it to the latter company, the court did right to sustain a demurrer to the evidence, so far as the latter company is concerned. This for the reason that no privity is shown to exist between that plaintiff and defendants. Nor can the Atlanta Lumber Company recover on the contract alleged, for the reason that before it can recover it must plead and prove a delivery of the property at the place where the lumber was sold, which was Atlanta, on the Texas Pacific Railway, and not Lodwick, on the Texas Southern. 24 Am. & Eng. En. Law, 1069. This was a condition precedent to its right of recovery, and was, in effect, the holding of the court when he sustained a demurrer to the evidence.

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In *Drumm-Flato Comm. Co. v. R. C. Edmisson*, 17 Okla. 344, 87 Pac. 311, the court, in the syllabus, said:

"Where a contract for the sale of personal property is silent as to the place of delivery, the law will presume that the property is to be delivered at the point where it is located at the time the contract is entered into."

In *Salmon v. Helena Box Co.*, 147 Fed. 408, 77 C. C. A. 586. Adams, Circuit Judge, said:

"In the absence of any contrary provision found in the contract for delivery, the general rule fixing the place of delivery at the place where the goods are located when sold, must prevail."—citing Benjamin on Sales, sec. 682; *Hatch v. Oil Co.*, 100 U. S. 124, 134, 25 L. Ed. 554. The same is true where the place of delivery is prescribed in the contract.

In *Hatch v. Oil Co.*, *supra*, after announcing the doctrine, *supra*, the court said:

"Decided cases to that effect are numerous; but the rule is universal that if a place of delivery is prescribed as a part of the contract the vendee is not bound to accept a tender of the goods made in any other place, nor is the vendor obliged to make a tender elsewhere. Story, Sales (4th Ed.), sec. 308. Where, by the terms of the contract, the article is to be delivered at a particular place, the seller, before he can recover his pay, is bound to prove the delivery at that place. *Savage Manuf. Co. v. Armstrong*, 19 Me. 147."

And so, whether the place of delivery is prescribed in the contract or not, we hold that when plaintiff wired back quotations which were accepted by defendants by wire, thus: "Atlanta Lbr. Co., Atlanta, Texas. Ship Car No. 3 boards to Paoli. Rush"—the contract thus closed required the Atlanta Lumber Company to ship the lumber from its mills at that place, as the place of delivery to defendants upon the car.

Salmon v. Helena Box Co., *supra*, was a suit at law by the Helena Box Company against Salmon & Co. to recover damages for the breach of an executory contract for the sale of lumber, and to recover a balance for lumber sold and delivered. There was no dispute as to the terms of the contract, which was in the shape of a letter addressed to the box company operating two mills at or near Helena, Ark. It read:

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"You may enter our order for the following cottonwood lumber: [Here follows a description of 4,000,000 feet of different grades and sizes of common commercial lumber and the agreed price for each kind.] All of the above on the Helena, Ark., rate of freight. [Here follows a description of 1,000,000 feet more of such lumber, and its price.] To be delivered on Cincinnati, Ohio, freight rate. * * * We can start shipping on the above at once, and understand that you will be in a position to ship us from 40 to 50 cars per month, in accordance with shipping directions. Shipments to be made in accordance with instructions, as given by us from time to time. [Signed] Hamilton H. Salmon & Co. Accepted: Helena Box Company, by H. W. Mosby, Secretary."

The question at issue was, Which party had breached the contract? and the court instructed in the alternative on the measure of damages. Among other things, in passing upon the instructions involving that question, the court held in effect that, as no contrary provision was found in the contract, Helena was the place of delivery; that being the place where the lumber was located when sold. And this is the rule, whether the articles sold are actually or only potentially there.

Janney et al. v. Sleeper, 30 Minn. 473, 16 N. W. 365, was an action to recover the price of glass alleged to have been sold and delivered to the defendant in Minneapolis. The defense was that the sale required delivery at Brainerd, and that the plaintiffs had failed to make delivery at that place. It appeared upon the trial that plaintiffs had shipped the glass to defendant by rail, and that it had been broken from Minneapolis to Brainerd. There was a verdict for plaintiff, and defendant appealed. After declaring the burden of proof to be upon the defendant to show that by the terms of the contract the glass was to be delivered to him at Brainerd, and not in the car at Minneapolis, as understood by the plaintiffs, the court said:

"If no place be designated by the contract, the general rule is that the articles sold are to be delivered where they are at the time of the sale. The store of the merchant, the shop of the manufacturer, and the farm of the farmer, at which the commodities sold are deposited or kept, must be the place of delivery, when the contract is silent upon the subject; at least, when there are no circumstances showing that a different place was intended.

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This is a rule of construction predicated upon the presumed understanding of the parties when making the contract. Benjamin on Sales, secs. 1018, 1022; 2 Chitty on Cont. 1201, 1202; 2 Kent, 505; *Middlesex Co. v. Osgood*, 4 Gray [Mass.] 447; *Smith v. Gillett*, 50 Ill. 290; *Hamilton v. Calhoun*, 2 Watts [Pa.] 139; *Lobdell v. Hopkins*, 5 Cow. [N. Y.] 516; *Rice v. Churchill*, 2 Denio [N. Y.] 145; *Wilmouth v. Patton*, 2 Bibb [Ky.] 280; *Sousely v. Burns*, 10 Bush [Ky.] 87. This rule is not changed by the fact that plaintiffs did not have the goods on hand at their place of business at the time of the sale, but had to procure them elsewhere in order to fulfill their contract. Potentially and prospectively the goods were as if then situate in their store at Minneapolis. Hence, in the absence of any evidence as to the place of delivery, it would be presumed to be at Minneapolis. To overcome this presumption, some evidence would be required tending to show that some other place was agreed upon. This was, in effect, all that the language of the court implied when he instructed the jury that the burden of proof was upon defendant to show that the goods were to be delivered at Brainerd, and not Minneapolis."

The reason for this is apparent; for title will pass to the purchaser if the property is delivered at the place designated in the contract, thereby enabling him to sue in damages for loss or injury thereto growing out of the negligence of the carrier. If attempted to be delivered elsewhere, title to him will not pass, and such right of action would be in the seller. Besides, delivery at the place designated in the contract would vest in the buyer an insurable interest; otherwise not. Hence the buyer has a right, with or without assigning a reason therefor, to insist upon this condition precedent to a right of recovery, as here; and without pleading and proving it plaintiff cannot recover.

In *Filley v. Pope et al.*, 115 U. S. 213, 6 Sup. Ct. 19, 29 L. Ed. 372, two citizens of New York, partners as Thomas J. Pope & Bros., sued Filley, a citizen of Missouri, in damages upon a written contract of sale, whereby they sold him 500 tons of pig iron at so much per ton upon delivery of the iron to him in bond at New Orleans, iron to be shipped from Glasgow, Scotland; delivery and sale to be subject to ocean risks. The note and memorandum of sale was duly accepted and set forth in the petition. The petition alleged that, pursuant to the terms of the contract,

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the iron was shipped from Glasgow to New Orleans, which, upon its arrival, they offered to deliver to defendant in bond at that port, and upon his refusal to receive it plaintiffs were forced to sell it at a loss. The answer admitted the contract and refusal to accept, but denied the other allegations of the petition, and alleged, among other things, as a ground for the refusal and in defense of the action that plaintiffs had failed to ship the iron from Glasgow. After reply filed there was trial, at which the evidence tended to prove that:

"Immediately after making this contract, the plaintiffs, by telegraph, bought the iron of John Anderson of Glasgow, and requested him to ship it to New Orleans. The iron was then at the works of the Shott's Iron Company in Scotland, equidistant and equally accessible by railway from the ports of Glasgow on the west coast and of Leith on the east coast; and such iron was sometimes shipped from Glasgow and sometimes from Leith. Anderson at once made diligent inquiry and efforts to secure transportation from Glasgow, and from Leith, and from other Scotch ports, to New Orleans, but, owing to the great scarcity of ships at that time, could only secure one vessel, the barque Alpha, which was then discharging her cargo at Leith. This vessel he chartered on February 23, 1880, three days after the contract in question was made at St. Louis. No vessel or transportation could be obtained from Glasgow to New Orleans then or for weeks afterwards. The iron was sent down from the works of the Shott's Iron Company to Leith as fast as the barque could receive it. With all speed she discharged her cargo, took in the iron, and sailed from Leith for New Orleans, where she arrived about May 26th. The distance by sea was greater from Leith to New Orleans than from Glasgow to New Orleans. If the Alpha had come round to Glasgow and shipped the iron there, it would have taken from 6 to 26 days, according to the winds, and she would have had to take in ballast at Leith and discharge it at Glasgow."

Upon this state of facts the trial court, among other things, instructed the jury that the provision in the contract that the iron was to be shipped from Glasgow was not material, "* * *" and that if the jury found that it was impossible for the plaintiffs to obtain a vessel from Glasgow, and that it was practicable to obtain one from Leith, and that shipment from Leith was a more expeditious way of getting the iron to New

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Orleans than waiting for a vessel from Glasgow would have been, then the plaintiffs were justified in shipping the iron from Leith instead of from Glasgow." But the Supreme Court held not so, and said:

"The contract between these parties belongs to the same class as that sued on in the case, just decided, of *Norrington v. Wright* [115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366], and likewise falls within the rule that in a mercantile contract a statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty or condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract. The provision in question in that case related to the time; in this it relates to the place of shipment. The thing sold and described in the contract is '500 tons No. 1 Shott's [Schotch] pig iron,' to be shipped 'from Glasgow as soon as possible.' It is not merely 500 tons of iron of a certain quality, nor is it such iron to be shipped as soon as possible from any Scotch port or ports; but it is iron of that quality, to be shipped from the particular port of Glasgow as soon as possible."

And after saying that the court was bound to give effect to the terms of the contract which the parties had chosen for themselves, further said:

"The term 'shipment from Glasgow' defines an act to be done by the sellers at the outset, and a condition precedent to any liability of the buyer. The sellers do not undertake to obtain shipment, nor does the buyer agree to accept iron shipped, at any other port. The buyer takes the risk of delay in getting shipment from Glasgow, or of delay or disaster in prosecuting the voyage from Glasgow to New Orleans. But he does not take the risk of delay or of sea perils which may occur in the course of the different voyage from Leith to the same destination. One or two illustrations may help to make this clear. If the sellers had shipped the iron by the first opportunity from Glasgow, the buyer could not have refused to accept it, even if it could have been shipped sooner from Leith. Again, the buyer would have an insurable interest in the iron during the voyage by reason of the title which would accrue to him, under the contract, on arrival and delivery, and of the profits that he might make in case of a rise in the market. 3 Kent, Com. 276; *French v. Hope Ins. Co.*, 16 Pick. [Mass.] 397; *Eastern Railroad v. Relief Ins. Co.*, 98 Mass. 420, 423."

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See, also, *Detroit So. R. v. Malcomson*, 144 Mich. 172, 107 N. W. 915, 115 Am. St. Rep. 390; *Danne-Miller v. Kirkpatrick*, 201 Pa. 218, 50 Atl. 928; *Sousely v. Burns, Adm'r*, 73 Ky. (10 Bush) 87; *Tuttle-Chapman Coal Co. v. Cole-Dale Fuel Co.*, 136 Iowa, 382, 113 N. W. 827; *Lucas v. Nichols and Trustees*, 5 Gray [Mass.] 309; *Fairbanks, etc., Co. v. Midvale, etc., Co.*, 105 Mo. App. 644, 80 S. W. 13; *Miles v. Roberts*, 34 N. H. 245.

As a condition precedent to its right to recover, the Atlanta Lumber Company should have alleged that it had duly performed all the conditions precedent in the contract, or a waiver thereof (*St. Paul, etc., Ins. Co. v. Mittendorf et al.*, 24 Okla. 651, 104 Pac. 354, 28 L. R. A. [N. S.] 651), and thus given defendants an opportunity to controvert the fact of delivery. Had such been pleaded, plaintiff, before it could have recovered its pay for this lumber, would have been bound to prove a delivery on board car at Atlanta. This allegation not being made, the petition was demurrable; but nevertheless defendants answered, which, construed with a view to substantial justice, claimed exemption from liability on the ground that it had no contract with the Lodwick Lumber Company, and hence refused to accept the lumber attempted to be delivered to them at Lodwick. It cannot in reason be said that defendants waived this condition precedent by their attempted cancellation of the order before they knew that the lumber would be attempted to be delivered at Lodwick. This for the reason that Atlanta Lumber Company, by failing to plead such waiver in excuse of its failure to deliver, thus making of such waiver an issuable fact, cannot insist upon it for the first time in this court, and in fact the same is not attempted.

International Money Box Co. v. Southern Trust & Deposit Co., 93 App. Div. 309, 87 N. Y. Supp. 881, was an action for goods sold and delivered under contract between the parties. It seems, as here, no waiver was pleaded, which would have made delivery needless. The trial court, upon failure to prove that plaintiff had sold and delivered to defendant the boxes in question, held that plaintiff could not recover, and dismissed the complaint. In affirming the judgment the court said:

"With respect to delivery, it was incumbent upon the plaintiff to prove either that the defendant had expressly repudiated the

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contract, which would have made a delivery needless and futile, or that a delivery was made in accordance with the terms of the contract. Upon the latter subject the contract provided that the delivery was to be made f. o. b. New York City, and the proof was that, without a request from the defendant, the plaintiff delivered to an express company at New York City the 400 boxes, with directions to deliver the same to the defendant at its place of business at Baltimore, Md.; the charges of carriage to be there collected. Such a tender we do not think was sufficient to pass the title of the boxes to defendant, because the plaintiff could not bind the defendant by tender at a place different than that specified in the contract; nor could it annex to the tender the burden or condition of paying the carrying charges. The failure, therefore, to prove a proper legal tender was fatal to plaintiff's right to recover upon this branch of the case."

And further, in effect, that an answer to which a demurrer had been sustained could not be considered on appeal as an admission against defendant, especially where the same was not offered by plaintiff as an admission, and that hence the allegations therein contained were not proof of waiver of the tender of the goods ordered, though the same recited that the order had been cancelled before the time any delivery was attempted.

We are therefore of opinion that the court did right in sustaining the demurrer to the evidence as to the Lodwick Lumber Company for want of privity, and as to the Atlanta Lumber Company for the reason that it has failed to allege or prove that delivery was made in accordance with the terms of the contract, or that defendant had repudiated the same, which would have made delivery a vain thing.

Finding no error in the record, the judgment of the trial court is affirmed.

HAYES, C. J., and KANE and DUNN, JJ., concur; WILLIAMS, J., dissents.

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MANDLER v. STARKS *et al.*

No. 2571. Opinion Filed April 15, 1913.

(131 Pac. 912.)

EVIDENCE—Parol Evidence—Written Contract. In an action of covenant, the deed governs, and parol evidence is inadmissible to show that at the time of the execution and delivery of the deed, containing a covenant against all "incumbrances of whatsoever nature," the grantee agreed to take the land subject to an outstanding lease, since such evidence would vary the covenant and exclude from the operation of its terms that which was not so before.

(Syllabus by the Court.)

Error from District Court, Bryan County;
Jas. R. Armstrong, Judge.

Action by Charles W. Mandler against Josephine Starks and others. Judgment for defendants, and plaintiff brings error. Reversed.

W. C. Franklin and *P. J. Carey*, for plaintiff in error.

Utterback, Hayes & MacDonald, for defendants in error.

TURNER, J. On January 18, 1909, Chas. W. Mandler, plaintiff in error, sued Josephine Starks, defendant in error, and others in the district court of Bryan county. The petition substantially states that on July 27, 1908, defendant and her husband, for value, made, executed, and delivered to plaintiff a warranty deed to a certain tract of land situated in said county, in which they covenanted to warrant the title thereto, and that the same was "clear and discharged of and from all former grants, charges, taxes, incumbrances of whatsoever nature." The petition further alleged a breach thereof to be that at that time there was outstanding upon said land a lease by the grantors to one J. L. Hull and also an oil and gas lease to the Saginaw Oil & Gas Company, both duly recorded; that thereafter, pursuant to agreement with the Starks and their codefendants, plaintiff deposited with defendant

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the First National Bank of Bennington, Okla., \$352.50, the balance of the purchase money which plaintiff would owe defendant if the land had been free and clear as warranted; that the same was deposited pursuant to agreement with said bank to be used in the extinguishment of said leases, but the same had never been done, and that the value of the premises, which are in possession of Hull who holds the same under said lease, is of the reasonable rental value of \$150 a year for the five years of his lease. Wherefore, plaintiff prayed \$600 damages and \$100 attorney's fee. All of the other defendants having been eliminated from the litigation, for answer Josephine Starks in effect pleaded a general denial, stood upon her deed, and prayed judgment against plaintiff for the \$352.50 deposited with the bank. After reply filed, there was trial to a jury and verdict and judgment for defendant, and plaintiff brings the case here. There is no dispute as to the facts. The deed recites that it was given on July 27, 1909, by defendant and her husband to the plaintiff for and "in consideration of the sum of \$1 and other valuable considerations," and contains the general covenant against incumbrances, *supra*.

It is conceded that the leases pleaded were outstanding against the property at the time of the execution and delivery of the deed, and that the amount paid for the land and tendered, as stated, was \$1,000. To escape liability defendant, over objection, was permitted to prove in substance that at the time of the execution of the deed she stated to plaintiff's agent that there was a lease on the land for five years, and for that reason she did not want to sell it; and that, after replying that he did not know what to do about it, the agent consulted plaintiff over the telephone, and then said he would take the land. "I says, 'Understand, with the lease on it,' and he says, 'Yes,'" and that thereupon she signed the deed.

It is contended that whether or not the court erred in instructing the jury to return a verdict for defendant for \$352.50, with interest, turns upon the question of the admissibility of this evidence. On the part of plaintiff it is urged that the same was inadmissible, because, he says, the same varied the terms of the

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written warranty, in that it tended to show that he had agreed to take the land subject to said outstanding leases, as held by the court. On the other hand, while it is admitted that parol evidence is not admissible to vary the terms of the covenant against incumbrances, yet it is urged that, as the deed recites the consideration to be "the sum of one dollar and other valuable considerations," this parol evidence was admissible to show the true consideration of the deed and involved no contradiction of the deed which evidenced upon its face that the "other considerations" rested in parol. As the covenant in the deed against incumbrances does not except these leases from the operation of its terms, to except them by parol evidence would be to permit such evidence to contradict the terms of the deed. In *Bever v. North*, 107 Ind. at page 546, 8 N. E. at page 578, the court, speaking to the rule that a grantor cannot contradict the terms of his deed by parol, said:

"There is, it is true, an exception to this general rule, as well established as the rule itself, and that exception is that parol evidence is admissible to prove the true consideration of a deed, except, perhaps, where the deed itself states the consideration fully and specifically. *Hays v. Peck* [107 Ind. 389, 8 N. E. 274]; *McDill v. Gunn*, 43 Ind. 315; *Carver v. Louthain*, 38 Ind. 530; *Pitman v. Conner*, 27 Ind. 337; *Allen v. Lee*, 1 Ind. 58 [48 Am. Dec. 352]. But the exception to the general rule does not permit the introduction of parol evidence to defeat the operation of the deed by rendering nugatory the words of conveyance which it contains, and a grantor cannot, under the guise of proving the consideration of a deed, prove that it was not to operate as a conveyance. To allow this to be done would be to render ineffective one of the most important parts of the deed; it would, in truth, be to permit the utter destruction of the deed as an instrument of conveyance. This the law will not allow. The principle which governs this case was thus stated by the court in *Beach v. Packard*, 10 Vt. 96 [33 Am. Dec. 185]: 'Parol evidence cannot be admitted to vary, contradict, add to, or control a deed or written contract. The deed of bargain and sale, between these parties, had for its object the conveyance of certain land; and the extent of the land conveyed, the parties thereto, the estate conveyed thereby, and the covenants attending it, could not be affected by parol proof; and even the part, which relates to the consideration, or the payment thereof, could not be contradicted

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or varied by parol, so as in any way to affect the purpose of the deed; that is, its operation as a conveyance.'"

Assuming the probative force of the evidence offered to be sufficient, if admissible, to prove that the vendee accepted the conveyance subject to the leases, the effect thereof, if admitted in evidence, would be no other than to prove that the parties to the deed, contemporary thereto, agreed in parol that these incumbrances should be excepted from the operation of the covenant. This, we repeat, would vary the terms of the deed, and for that reason was inadmissible.

In *Johnson v. Elmen*, 94 Tex. 168, 59 S. W. 253, 52 L. R. A. 162, 86 Am. St. Rep. 845, the court said:

"The cases in which the question of the admissibility of parol evidence to affect a covenant against incumbrances in a deed conveying land arises may be divided into three classes. In many cases it has been sought to show that one or more incumbrances were known to the covenantee, and to exclude such from the operation of the covenant. But it is held, certainly by the great weight of authority, that this cannot be done. * * * In other cases it has been held that parol evidence cannot be admitted to show merely that the parties orally agreed that a certain incumbrance should be excepted from the operation of the covenant. To admit such evidence is to violate the familiar rule that parol evidence is not admissible to vary the terms of a written contract. So far, the courts are in practical accord."

2 Devlin on Real Estate, sec. 914, says:

"It is a well-settled rule that parol evidence is inadmissible to contradict a written contract. Accordingly, where it is intended by the parties that a certain incumbrance is to be excluded from the general operation of the covenant, such fact should be mentioned in the deed. When both parties are cognizant of incumbrances existing on the land to be conveyed, this covenant is frequently made and accepted. The grantor may intend to discharge them from the purchase money, or to remove them at some future period, and the purchaser has a right to rely on the language of the covenant. In some states parol evidence is admissible to show that the plaintiff at the time of the execution of the deed agreed himself to discharge the incumbrance. * * * But, while the rule is not universal, it is generally held that, aside from the question of fraud or mistake, parol evidence is not admissible to show that a covenant against incumbrances, where

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no exception is contained in the deed itself, was not intended by the parties to apply to a particular incumbrance. * * *

Van Wagner v. Van Nostrand, 19 Iowa, 422, was an action by the plaintiff, the assignee of one Lawrence, against defendant on a covenant against incumbrances in a deed for real estate made by Van Nostrand to Lawrence. For breach thereof it was assigned, in substance, that at the date of the execution of the deed one Wennell was in possession of the premises as a tenant under an unexpired lease from defendant, and that he had so remained some months, during which time defendant received and collected rent therefor. For further breach it was assigned that during his tenancy, by agreement with defendant, the tenant built a stable thereon with the right to remove it; that the building was upon the premises at the date of the execution of the deed, and was removed by him during the life of the lease. After answer filed there was trial to the jury and judgment for defendant. On review, after holding that a breach existed in the covenant against incumbrances contained in the deed, the court said:

"According to the weight of authority, it is no less a breach if it be assumed that the plaintiff or covenantee knew at the time of the conveyance that the stable was the property of the tenant, and that the latter had the right of removal. For in an action of covenant the deed governs; and in such an action, by grantee against grantor, the latter cannot, in order to defeat the operation of the covenant, establish by parol the grantee's knowledge of an incumbrance or defect in the title, or by parol ingraft upon the deed exceptions and reservations not therein mentioned. *Wickersham v. Orr*, 9 Iowa, 253 [74 Am. Dec. 348]; *Harlow v. Thomas* (Strong case) 15 Pick. [Mass.] 66, 1833, approving *Townsend v. Weld*, 8 Mass. 146, 1811; *Mott v. Palmer*, 1 N. Y. 574, per Bronson, J.; *Collingwood v. Irvin*, 3 Watts [Pa.] 306, 1834; 1 Greenl. Ev. 275; 2 Cox & H. notes, Phil. Ev. 467; and see other authorities cited, and question discussed by Rawle on Cov. 149-154."

In *Edwards v. Clark et al.*, 83 Mich. 246, 47 N. W. 112, 10 L. R. A. 659, the first section of the syllabus reads:

"An outstanding lease is a breach of a covenant in a deed of the property against 'all incumbrances whatever,' where no exception of such lease is stipulated for in the deed; it cannot be

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shown by parol that the lease was in fact regarded by the parties as no incumbrance."

In *Grice v. Scarborough*, 2 Speers [S. C.] 649, 42 Am. Dec. 391, in the syllabus it is said:.

"Where the grantor of a tract of land covenants against all incumbrances, it cannot be shown by parol that he did not warrant against a particular incumbrance; therefore, a plea averring the plaintiff had notice of the outstanding lease was no bar to the action, and a general demurrer thereto should have been sustained."

And in the opinion:

"On the question of the insufficiency of the defendant's plea, I think there can be no doubt. The contract is in writing. Parol evidence cannot be received to explain that the parties intended to add or subtract anything from it. It would be to make a new contract, where the grantor covenants against all incumbrances, to show by parol that he did not warrant against a particular incumbrance. And that, I suppose, is the inference to be drawn from the alleged notice. The very object of the covenant may have been to compel the seller to extinguish the incumbrance, that the purchaser might have the full possession and enjoyment of the premises. I am therefore of the opinion, the breach is well assigned in the declaration, that the defendant's plea is no bar, and that the demurrer should have been sustained."

See, also, *McGee v. Dwyer Ex'x, etc.*, 22 Tex. 436; *Big-ham et al. v. Bigham*, 57 Tex. 238; *Townsend v. Weld*, 8 Mass. 146; *Spurr v. Andrew*, 6 Allen (Mass.) 420; *Harlow v. Thomas*, 15 Pick. (Mass.) 66; *Long v. Moler*, 5 Ohio St. 272; and *Batchelder v. Sturgis et al.*, 3 Cush. (Mass.) 201.

We are therefore of the opinion that, as the force of the evidence admitted rendered nugatory the covenant against incumbrances attending the conveyance and excepted from the operation of its terms the leases outstanding against the land at the time of its execution and delivery, the same was inadmissible, and for that reason the judgment of the trial court should be reversed.

In so holding we are not unmindful of those cases which hold that parol evidence is admissible to prove, where as here, the same is not fully stated, the true consideration of the deed, and, where such evidence does not contradict or vary the cove-

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nants contained in the deed, that the grantee himself agreed to discharge the incumbrance as part of the consideration for the land conveyed as in *Johnson v. Elmen*, *supra*, and cases cited. 11 Cyc. 1155. Of such it is sufficient to say that the law there announced has no application to the facts in this case, for the reason that here the leases are incapable of extinguishment by payment, and, besides, such evidence varies the covenant, and excludes from the operation of its terms that which was not so before. Upon the reformation of this deed we express no opinion. Reversed.

HAYES, C. J., and KANE and DUNN, JJ., concur: WILLIAMS, J., absent, and not participating.

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| | Park v. Merrill | 208 |
| 27. | Time for Taking Proceedings—Change in Law. Amendment to St. 1893, §4452, contained in Sess. Laws 1910-11, c. 18, reducing time for appeal, applies to judgments entered after it became effective. Buchanan v. Loving | 207 |
| | Holcombe v. Lawyers' Co-Op. Pub. Co. | 260 |
| 28. | Same. By reason of chapter 18, p. 35, Sess. Laws 1910-11, the Supreme Court is without jurisdiction to entertain an appeal commenced in the Supreme Court more than six months after the rendition of the judgment or final order complained of. Powell et al. v. Johnson-Larimer Dry Goods Co. | 644 |
| | Thorne v. Harris | 645 |
| | Honley v. First Nat. Bank | 649 |
| 29. | Same. The time within which to perfect an appeal under said statute dates from the rendition of the judgment or order appealed from, and not from the entry thereof. Powell et al. v. Johnson-Larimer Dry Goods Co. | 644 |
| 30. | Same. Where a motion for a new trial was overruled on February 11, 1911, and the petition in error with case-made attached was filed with the clerk of the Supreme Court on February 13, 1912, the Supreme Court has no jurisdiction to entertain same. St. Clair v. Hufnagle | 394 |
| 31. | Same—Review by Transcript. When a judgment of the lower court is sought to be reviewed by transcript, the proceeding in | |

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error must be commenced in this court within six months from the date of its rendition. *Schollmeyer v. Van Buskirk*..... 439

32. **Petition in Error—Amendment—New Assignments.** An assignment that the court erred in overruling a motion for a new trial, being a new and distinct assignment, cannot be added to a petition in error by amendment after the time for perfecting the writ has expired. *Missouri, O. & G. Ry. Co. v. McClellan*..... 609
Smith v. Alva State Bank..... 638

RECORD AND PROCEEDINGS NOT IN RECORD:

33. **Record—Errors Must be Shown.** Errors, unless made a part of the record by case-made or bill of exceptions, will not be considered on review. *Muskogee Electric Traction Co. v. Reed*..... 334
34. **Record—Exclusion of Evidence.** Where a trade paper, sought to be introduced in evidence, was not preserved as a part of the record on a writ of error, the court's refusal to admit the paper was not reviewable. *St. Louis & S. F. R. Co. v. Bilby*..... 589
35. **Record—Equity Cases.** Under the practice in force in the Indian Territory prior to the erection of the state in equity cases, all papers properly filed in the case became on appeal a part of the record to be included in the transcript. Neither was any motion for a new trial necessary nor a bill of exceptions, except where oral testimony had been used and not taken down and filed as depositions. *Harrison v. Murphy*..... 135
36. **Transcript—Motion for New Trial.** A motion for a new trial is not a part of the record brought up by a transcript. *Schollmeyer v. Van Buskirk*..... 439
37. **Transcript—Objection to Sufficiency of Petition.** Objections to the introduction of evidence, on the ground that the petition did not state a cause of action, cannot be reviewed on a transcript. *Cook v. State*..... 653
38. **Case-Made—Extension of Time.** A special judge, or a judge pro tempore, has no power, after he ceases to sit as a judge, to extend the time for making and serving a case-made; and, where he attempts to do so, his act is a nullity. *Lidecker Tool Co. v. Coghill*..... 134
39. **Same.** Neither the court nor the judge thereof in vacation, after the time prescribed by the statute or granted by the court within which to prepare and serve a case-made has expired, has power to extend the time fixed by statute or previously granted by the court in which to make and serve a case-made. *Perry v. Hoblit*..... 362
40. **Same.** A judge of the district court has no power to extend the time to make a case-made when he is out of the state, and an order so made is absolutely void. *Idem*..... 362
41. **Same.** The trial judge, after the time for making and serving a case-made, as previously extended by the court, has expired, has no power to extend further the time for making and serving a case. *Hurst v. Wheeler*..... 639
Bond v. Watson..... 648

APPEAL AND ERROR—Continued.

42. **Same.** The party desiring to have a judgment or order reviewed by the Supreme Court must prepare and serve his case-made on the opposite party within three days after the judgment or order is entered; and, unless the case is served within that time or within an extension of time allowed by the court or judge within such time, the case will not be considered in this court. **Fife v. Cornelous** 402
43. **Same.** A purported order of the trial judge extending the time in which to make and serve a case-made is without force where the case-made fails to show affirmatively that such order was made and is entered of record. **Idem**..... 402
44. **Case-Made—Service.** Where a case-made is not served upon the defendant in error or its counsel within three days after the motion for a new trial was overruled, nor within the extension of time granted by the trial court, the appeal must be dismissed. **Lorenson v. J. H. Conrad & Co.** 406
45. **Same.** Where a joint judgment is sought to be reviewed on error, with case-made attached, the case-made must be served on all the parties against whom the judgment is rendered. **Cook v. State**.... 653
46. **Same.** That a party on whom service was not had as to the case-made and the settling of the same made default before joint judgment does not affect his right to service of case-made. **Idem** 653
47. **Same.** Where service of case-made is not had on all proper parties to the proceeding, unless service is waived or an appearance entered, the case-made is a nullity. **Idem**..... 653
48. **Same—Settlement—Dismissal.** Where the record does not show that defendant in error was present at the settlement of the case-made, or that notice was served on him, or as to rulings on any amendments, the writ of error will be dismissed. **Flathers v. Flathers** 342
- Phillips v. Koogler**..... 438
- Jones v. Jones**..... 453
- Pain v. Wylie**..... 467
49. **Case-Made—Filing Below.** The case-made attached to the petition in error, or a copy thereof, not having been filed with the papers in the case in the court below, the same is a nullity, and cannot be considered for the purpose of reviewing matters complained of in the trial court. **Abbott v. Rodgers**..... 189
- Peck v. Stephens**..... 468

BRIEFS AND ASSIGNMENTS OF ERROR:

50. **Assignments Not Supported by Authority.** Assignments of error presented by counsel in their brief or oral argument, if unsupported by authority, will not be noticed by the court, unless it is apparent without further research that they are well taken. **Title Guaranty & Surety Co. v. Slinker**..... 123, 153
51. **Abstract of Record—Failure to Include.** Where plaintiff in error fails to observe rule 25 (20 Okla. xii, 95 Pac. viii) of this court, the proceeding in error may be dismissed. **Seals v. Aldridge**..... 253

APPEAL AND ERROR—Continued.

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| 52. | Same. An assignment of error will not be reviewed, unless Supreme Court rule 25 (20 Okla. xii, 95 Pac. viii), requiring that the brief of plaintiff in error contain an abstract of the record, so that no examination of the record itself need be made, is complied with. Seminole Townsite Co. v. Town of Seminole | 554, 558 |
| 53. | Same. Where plaintiff in error fails to comply with rule 25 (20 Okla. xii, 95 Pac. viii), which requires that his brief contain an abstract of the transcript so that no examination of the record itself need be made, the judgment will be affirmed. Ebey v. Krause | 689 |
| 54. | Specifications of Error. Where the brief of plaintiffs in error fails to contain specifications of error complained of, separately set forth and numbered, and argument and authorities in support thereof stated in the same order, as required by rule 25 (20 Okla. xii, 95 Pac. viii), the appeal will be dismissed. Vanselous v. McClellan | 505 |
| | Indian Land & Trust Co. v. Widner | 652 |
| 55. | Failure to File Brief—Reversal. Where plaintiff in error has served and filed his brief in compliance with rule of this court, and defendant in error has neither filed a brief nor offered an excuse for such failure, the court is not required to search the record to find some theory upon which the judgment of the court below may be sustained, but may, where the brief appears reasonably to sustain the assignments of error, reverse the case in accordance with the prayer of the petition. Hampton v. Thomas | 529 |
| | REVIEW: | |
| 56. | Questions of Fact—Findings of Court. Where a case is tried by a lower court without a jury, and special findings of fact are made, based partly upon oral testimony, such findings, as a rule, are conclusive upon any disputed and doubtful questions of fact. Cowles v. Lee | 159 |
| 57. | Same. A cause having been tried to a court without a jury, a general finding by said court in favor of one of the parties will be given, upon appeal, the same weight and effect as the verdict of a jury. Roberts v. Mosler | 691 |
| 58. | Same. Where the testimony was oral and conflicting and the finding of the court is general, such finding is a finding of every special thing necessary to be found to sustain the general finding, and is conclusive upon the Supreme Court upon all doubtful and disputed questions of fact. Farmers' & Merchants' Nat. Bank v. School Dist. No. 56 | 506 |
| 59. | Same. Where there is a conflict in the evidence on an issue, a finding thereon made by the lower court will not be disturbed on review in this court. Dewalt v. Cline | 197 |
| 60. | Same—Verdict. No error having been committed by the trial court in the admission or rejection of evidence, and the cause having been submitted under proper instructions to the jury, there being evidence reasonably supporting the verdict, the judgment thereon will be affirmed. Jack v. Gerber | 700 |

APPEAL AND ERROR—Continued.

61. **Same.** When there is any evidence reasonably tending to support the verdict of a jury, the same will not be reversed on appeal because of evidence which may conflict therewith. **Town of Fairfax v. Giraud** 659
62. **Same.** An order denying a new trial will not be reversed where the evidence is conflicting, and the instructions fully state the issues. **Kiser v. Nichols** 8
63. **Same.** Where questions of fact are submitted to a jury, and there is competent evidence reasonably tending to support every material averment necessary to uphold the verdict, and the instructions fairly state the issues and fix the burden thereon, and judgment is rendered in accordance with the verdict, the Supreme Court will not reverse an order denying a new trial. **Spaulding Mg. Co. v. Lowe** 559
64. **Same—Conclusiveness of Verdict.** Where the plaintiff permits issues to be submitted to the jury without objection and exception, the verdict on review is conclusive, except as to excessive damages, appearing to have been given under the influence of passion and prejudice. **Muskogee Electric Traction Co. v. Reed** 334
65. **Findings—Insufficiency of Evidence.** Where a case is tried before a court without a jury, as where it is tried before a jury, if there is absence of any evidence reasonably tending to support the finding of the court, the finding of the court and the judgment thereon will be set aside on appeal. **Hampton v. Thomas** 530
66. **Verdict—Insufficiency of Evidence.** Where there is lacking any evidence reasonably tending to support any essential issue that was or must have been found in favor of the prevailing party in order to return a general verdict for him, such verdict will be set aside on writ of error. **Conwill v. Eldridge** 537
67. **Discretion of Trial Court—New Trial.** New trials should be granted where the moving party has not in all probability received substantial justice, though it may be difficult to state the grounds so plainly that the Supreme Court could understand them as well as the trial court. **Hughes v. Chicago, R. I. & P. Ry. Co.** 482
68. **Same—Erroneous Instructions on Proximate Cause.** The grant of a new trial for refusal of an instruction requested by defendant as to proximate cause in addition to one given at the request of plaintiff on that subject held not such an abuse of discretion as to constitute reversible error. **Idem** 482
69. **Same—Dissolution of Temporary Injunction.** The dissolution of a temporary injunction is usually in the discretion of the court, and will not be held erroneous, except in case of manifest abuse or on clear showing of error. **Yale Theater Co. v. City of Lawton** 444
70. **Same—Refusal of Injunction.** Where a petition shows that plaintiffs are entitled to the relief demanded and such relief consists in restraining the commission or continuance of some act, the refusal of a temporary injunction authorized by Comp. Laws 1909, sec. 5756, will be an abuse of discretion reviewable on writ of error. **Perry Public Library Ass'n v. Lobnitz** 576

APPEAL AND ERROR—Continued.

71. **Harmless Error—Rulings on Evidence.** The improper admission or rejection of evidence, if not prejudicial to the party complaining, is not ground for reversal. **City of Anadarko v. Argo**..... 115
Tate v. Stone 369
72. **Same.** Where the pleadings admit that H. was guardian of N., it was harmless error to admit parol evidence that H. was such guardian. **Tate v. Stone** 369
73. **Presumptions—Amendment of Pleading Regarded as Made.** Where, in an action for commission for the sale of land, plaintiff declares on an express contract to pay him five per cent., and evidence is introduced without objection that such commission is customary, the pleading is presumed to be amended to conform to the proof, and an instruction as to reasonable commission will not be disturbed. **Carson v. Vance** 584
74. **Sufficiency of Petition—Default Judgment.** On petition in error to reverse judgment by default, if the allegations of the petition are insufficient to sustain a judgment, it will be reversed. **Grissom v. Beidleman** 343

DISPOSITION OF CAUSE:

75. **Affirmance—Failure to Prosecute.** Where judgment was rendered below for a certain sum, and plaintiff in error fails to prosecute his proceeding in error, the judgment, on motion, will be affirmed. **McKain v. J. I. Case Threshing Mach. Co.**..... 164

APPEARANCE BONDS—See “Bail.”

ASSIGNMENTS—See “Mines and Minerals.”

ASSIGNMENTS OF ERROR—See “Appeal and Error,” 32, 50, 52; “Carriers,” 1, 2.

ATTORNEY AND CLIENT—See “Appeal and Error,” 23, 24; “Constitutional Law,” 5, 6; “Drains”; “Fines”; “Infants”; “Judges”; “Jury.”

1. **Contingent Fee—Lien.** Under Laws 1909, c. 4, a client may contract to pay his attorney a percentage of the proceeds of his cause of action, whereupon his client cannot, without consent of his attorney, compromise his cause of action so as to affect the attorney’s fee, or abrogate his lien therefor. **Herman Const. Co. v. Wood** 103
2. **Same—Settlement by Client—Rights of Attorney.** Where a contract for contingent fee has been made and a compromise had between the client and the adverse litigant, without consent of the attorney, the latter may sue the adverse litigant for the amount due him under his contract by virtue of Laws 1909, c. 4, and show the amount his client would have been entitled to if the suit had been prosecuted to judgment. **Idem** 103
3. **Disbarment—Jurisdiction.** The Supreme Court has inherent power independent of statute to disbar attorneys for misconduct. **State Bar Commission v. Sullivan** 745

ATTORNEY AND CLIENT—Continued.

4. **Same—Statutory Provisions Cumulative.** The Supreme Court is not limited in its disciplinary power over attorneys to the grounds and remedies indicated by statute, but the statutory provisions are merely cumulative. **Idem** 745
5. **Same—Malicious Attacks on Court.** The printing and publication of a pamphlet falsely and maliciously attacking the integrity of the courts and the judges thereof, designed to willfully, purposely, and maliciously misrepresent and bring them into disrepute, held ground for disbarment of an attorney. **Idem** 745
6. **Same—Malicious Publication—Statute of Limitation as Defense.** In a proceeding for disbarment upon charges of the publication of a pamphlet disrespectful to the court, the statute of limitations is not available as a defense, especially where the pamphlet remains in circulation until a time within what would be the limitation period if the statute of limitations be construed to apply. **Idem** 745
7. **Same—Verification of Charges.** Under Comp. Laws 1909, sec. 267, no verification of the charges is necessary in disbarment proceedings brought by the state bar commission by order of the Supreme Court. **Idem** 745
8. **Same—Evidence of Affiant.** The sufficiency of the verification of the charges in disbarment proceedings must be determined by an inspection of the verification, and the evidence of affiant cannot be received to show that he had no personal knowledge as to the charges. **Idem** 745
9. **Same—Grounds for Disbarment—Malicious Pleadings.** While, under Comp. Laws 1909, sec. 266, an attorney cannot be disbarred for filing a pleading, a petition with pamphlet attached which falsely and maliciously attacks the courts and judges may be considered as evidence of the attorney's unfitness to practice law. **Idem** 745
10. **Same—Sufficiency of Evidence.** In disbarment proceedings, the guilt of the accused should be proved by a clear preponderance of the evidence, but not necessarily beyond a reasonable doubt. **Idem** 745

AUCTIONS AND AUCTIONEERS:

- Sales—Title of Purchaser.** Where, at the public sale of A's goods, with the knowledge and consent of all concerned, B's goods are knocked down and sold to the highest bidder, and where, in compliance with the terms of the sale, a note and mortgage evidencing the indebtedness and securing the purchase price is executed by the purchaser, payable to A., and delivered to and accepted by him, held, that thereupon title and right of possession to the property passed to the purchaser. **Brochers v. Nickel** 473

B.

BAGGAGE AGENTS—See "Carriers," 9-11.

BAIL:

1. **Recognizances—Effect of Continuance.** A recognizance, conditioned to appear and answer to a charge at a named term of the court and not depart therefrom without leave, may be extended

RAIL—Continued.

- by continuance of the cause to a subsequent term. **Knight v. State ex rel.** 375
2. **Same—Failure to Appear—Forfeiture.** Where a party fails to appear at a term to which a recognizance, executed under Comp. Laws 1909, sec. 7112, had been extended, the recognizance may be forfeited and enforced against the sureties. **Idem** 375

BANKS AND BANKING—See “Sales,” 2.

1. **Deposits—Guaranty Fund—Permanent School Fund.** Comp. Laws 1909, sec. 7943, provides a specific system for the protection of any part of the permanent school fund temporarily deposited in banks or trust companies, and the protection extended to general depositors by section 323, providing for the Depositors’ Guaranty Fund, does not apply to deposits of the permanent school fund. **Columbia Bank & Trust Co. v. Southern Surety Co.** 401
2. **Insolvency of State Bank—Disposition of Assets—Priorities—Depositors’ Guaranty Fund.** Under Comp. Laws 1909, sec. 323, giving the state a first lien on the assets of any defunct bank for the benefit of the Depositors’ Guaranty Fund, until after the deficiency of the guaranty fund is made up, the remaining assets will be prorated among the general creditors of the bank. **Lankford v. Oklahoma Engraving & Printing Co.** 404
3. **Collections—Duties of Bank—Liability.** Where a bank receives commercial paper for collection, it must do all reasonable acts necessary to procure its payment, and if it fails, causing loss to its principal, it is liable therefor. **St. Louis Carbonating & Mfg. Co. v. Lookeba State Bank** 434
4. **Same—Negligence—Measure of Damages.** The measure of damages in an action against a negligent collecting bank is the actual loss which plaintiff has suffered, which *prima facie* is the amount of the claim given the bank for collection, where there is a reasonable probability that it could have been collected except for the bank’s negligence. **Idem** 434

BILLS AND NOTES—See “Auctions and Auctioneers”; “Banks and Banking”; “Chattel Mortgages”; “Partnership”; “Sales.”

1. **Delivery—Conditions.** A promissory note may be delivered by the maker to the payee upon condition, or as an escrow. **Tovera v. Parker** 74
2. **Same.** A promissory note may be delivered conditionally, and this may be accomplished by delivery to the payee himself, with proper instructions in relation to the condition. **Horton v. Birdsong** 275
3. **Rights and Liabilities on Transfer—Bona Fide Purchasers.** The indorsee of a negotiable promissory note for value and before maturity from another who is the apparent owner obtains a good title, and, in order to defeat his recovery thereon against the maker, defendant must not only plead facts and circumstances that would cause one of ordinary prudence to suspect that the person from whom he obtained it had no interest in it, but must go further and plead that the indorsee had actual notice thereof. **City State Bank of Hobart v. Pickard** 243

BANKS AND BANKING—Continued.

4. **Same—Actions—Pleading.** In an action by an indorsee on a note, the plea of defendants held not to show that the indorser had no title to the note, or that the indorsee had notice that he had no title. *Idem* 243
- BOARDS**—See “Elections”; “Judgment”; “Limitation of Actions”; “Prohibition”; “Schools and School Districts”; “Taxation.”
- BONDS**—See “Bail”; “Guardian and Ward”; “Mandamus”; “Townships.”
- BRIDGES**—See “Mandamus”; “Townships.”
- BRIEFS**—See “Appeal and Error,” 50-55.
- BROKERS**—See “Appeal and Error,” 73.
- Compensation—Performance of Contract.** A real estate agent authorized to sell land for another for a stated price for a certain compensation has earned his commission when he produces a purchaser ready, willing, and financially able to purchase the land upon the terms and conditions agreed upon. *Carson v. Vance* 584
- BURDEN OF PROOF**—See “Drains”; “Municipal Corporations,” 16.

C.

- CARRIERS**—See “Commerce”; “Evidence,” 5, 6; “Railroads”; “Witnesses.”
1. **Rate Regulation—Orders of Corporation Commission—Modification.** Where, after an appeal from freight rates promulgated by the Corporation Commission, the Commission recommended a modification of its order, and appellants submitted the appeal on the record and recommendation, without briefs, and without pointing out wherein the order as modified was unreasonable, it will be affirmed as modified. *Chicago, R. I. & P. Ry. Co. v. State* 214, 220, 224, 229
2. **Rate Regulation—Orders of Corporation Commission—Affirmance.** An appeal having been prosecuted from an order of the Corporation Commission promulgating rates, rules, and regulations, and the appellants and appellee appearing in open court and agreeing to submit said appeal on the record, and waiving the filing of briefs, it not being pointed out by specification of error wherein such order would be unreasonable and unjust, held, that said order will be affirmed. *Chicago, R. I. & P. Ry. Co. v. State* 233
3. **Interurban Fares—Order of Corporation Commission.** On appeal from an order of the Corporation Commission fixing for an interurban line fares for students attending certain colleges, evidence held to overcome *prima facie* presumption of the reasonableness of such charges obtaining under Const. art. 9, sec. 22, so as to authorize the reversal of such order. *Oklahoma Ry. Co. v. State* 463
4. **Corporation Commission—Contempt Proceedings—Pleading—Jury Trial.** In a proceeding in contempt for the punishment of a corporation for the violation of an order of the Corporation Commission, pursuant to Act May 29, 1908, Sess. Laws Okla. 1907-08, p.

CARRIERS—Continued.

- 228, verification of the information filed with the commission is waived by answering to the merits; and in such proceeding the contemnor is not entitled to a trial by jury. **Atchison, T. & S. F. Ry. Co. v. State** 532
5. **Same—Appeal from Orders of Commission—Presumption.** Evidence examined, and held that the *prima facie* presumption of reasonableness and justness attending the order of the commission fining appellant for violating rule 6 of order No. 168 requiring carriers to begin the forward movement of freight towards its destination within 24 hours after the bill of lading is signed, was not overcome. **Idem** 532
3. **Live Stock Shippers—Dipping of Cattle—Fees—“Public Service.”** The dipping of cattle in vats by a railroad transporting them from points below the quarantine line to points above it, under quarantine regulations prescribed by law, is so involved in the carriage of such cattle as to constitute a part of the railroad’s public service. **Midland Valley R. Co. v. State** 672
7. **Same.** The dipping of cattle brought above the quarantine line is a public service. **Idem** 672
3. **Same—Powers of Corporation Commission.** The Corporation Commission has the power, under Const. art. 9, sec. 18, to fix a reasonable charge to be paid by shippers to the railroad for the dipping of cattle brought above the quarantine line before delivery. **Idem** 672
9. **Regulation—Power of Corporation Commission.** Const. art. 9, sec. 18 (1), gives the Corporation Commission authority to supervise, regulate, and control railroad companies in all matters relative to the performance of their public duties and their charges therefor, and to prevent unjust discrimination. **Chicago, B. I. & P. Ry Co. v. Filson** 89
0. **Same—Passes for Baggage Agents.** The Corporation Commission has jurisdiction to determine the question of an alleged discrimination by a railroad company in the issuance of passes to baggage agents of other companies. **Idem** 89
1. **Same.** Under Const. art. 9, sec. 13, permitting railroads to give free transportation to baggage agents traveling on their trains, it is immaterial whether or not such agent is employed by the railroad giving the transportation. **Idem** 89
2. **Contracts—State Regulation.** All contracts or bills of lading made by carriers as to intrastate shipments, which are inconsistent with the rates, charges, classifications, rules, and regulations adopted by the Corporation Commission, are void. **St. Louis & S. F. R. Co. v. Bilby** 589
3. **Same.** Only such contracts relating to intrastate shipments as are made pursuant to rules and regulations adopted by the Corporation Commission are valid. **Idem** 589
4. **Interstate Commerce—Contracts Limiting Liability.** A carrier’s common-law liability for the safe carriage in interstate commerce may be limited by a special contract supported by a considera-

CARRIERS—Continued.

- tion, if reasonable and fairly entered into by the shipper, and not covering losses caused by the carrier's negligence or misconduct. **Idem** 589
15. **Carriage of Cattle—Damages—Evidence.** Where a petition against a carrier for damages to cattle charged rough and indifferent handling, by which the cattle were badly bruised, evidence that the cattle were badly bruised, by their being lugged about in the cars and jammed against the sides and ends of the cars, was within the issues. **Idem** 589
16. **Freight—Delay in Delivery.** In an action against a common carrier for negligent delay in the carriage and delivery of machinery intended for use, the proper measure of damages, in the absence of special notice, is the usable or rentable value of the machinery during the period of delay, together with such reasonable expenses as may be incurred by plaintiff in searching for, recovering, or in endeavoring to secure delivery. **M., O. & G. Ry. Co. v. Hazlett & Price** 12
17. **Same—Damages.** Where, on the trial of an action for damages alleged to have been caused by negligent delay in the delivery of certain well machinery, plaintiff, without notice that employees' wages would be lost in the event of delay in delivery, was permitted to recover for the same—**held, error. Idem** 12
18. **Connecting Carriers—Loss of Freight—Extent of Liability.** With reference to a shipment made prior to the passage of Act Cong. June 29, 1906, the initial carrier, in the absence of special agreement to the contrary, is liable only for loss or injury occurring on its own line. **St. Louis, I. M. & S. Ry. Co. v. Carlile** 118
19. **Same—Presumption of Liability.** Where part of a shipment over the lines of connecting carriers is lost, the presumption is that the loss occurred on the line of the delivering carrier. **Idem** 118
- CASE-MADE**—See "Appeal and Error," 33, 38-49; "New Trial."
- CATTLE**—See "Animals."
- CHAMPERTY AND MAINTENANCE:**
- Deed by Party Out of Possession—Indians.** Where grantor is an Indian allottee from whose power to alienate his allotment restrictions have been removed, and another is in possession claiming title under a void deed executed before removal of restrictions, the deed of such grantor is void as between the grantee and the party in adverse possession, under Comp. Laws 1909, sec. 2215, because executed at a time when grantor was not in possession. **Miller v. Fryer** 145
- CHANCERY**—See "Equity."
- CHANGE OF NAME**—See "Names."
- CHARGE TO JURY**—See "Instructions."
- CHATTEL MORTGAGES**—See "Names."
- Replevin—Evidence—Defense.** In a replevin action for the recovery of possession of certain chattels by virtue of a mortgage, the answer not disclosing a complete defense to the mortgage debt but only a partial failure of consideration, judgment was properly entered in favor of the plaintiff against the defendant. **Jones v. Bostick** 363

CHILDREN—See "Adoption"; "Descent and Distribution"; "Rape."

CITIES—See "Municipal Corporations."

CLERKS OF COURTS:

1. **Superior Court Clerk.** The office of clerk of the superior court is a county office. *Sexsmith v. Chappell* 503
Beaty v. State 677
2. **Same—Terms—Repeal of Statute.** Section 8 of the act of March 6, 1909 (Sess. Laws 1909, c. 14, art. 7; chapter 24, art. 4, sec. 1972, Comp. Laws 1909), in so far as it affects the term of the clerk of the superior court, is repealed by section 19 of the act of March 19, 1910 (chapter 69, Sess. Laws 1910, pp. 129, 137). *Idem* 503, 677
3. **Same—Election.** The laws in force in this state at the time of the holding of the election for county officers in November, 1912, provide for the election of the clerk of the superior court. *Idem* 503

COLLATERAL ATTACK—See "Guardian and Ward," 5.

COLLECTIONS—See "Banks and Banking"; "Sales," 2.

COMBINATIONS IN RESTRAINT OF TRADE—See "Fines"; "Gas."

COMMERCE—See "Carriers," 12-14.

Interstate Transportation—State Regulation. Since the passage of the Hepburn Act, relating to interstate transportation contracts, a state is not entitled to pass or enforce acts relating to the same subject under the police power; and hence section 9, art. 23 (Williams' Ann. Const. sec. 358), regulating such contracts, can apply only to intrastate shipments. *St. Louis & S. F. R. Co. v. Bilby* 589

COMMERCIAL PAPER—See "Bills and Notes."

COMMON CARRIERS—See "Carriers."

COMPROMISE AND SETTLEMENT—See "Attorney and Client," 1, 2; "Evidence," 1.

What Constitutes. A "compromise" is an agreement between two or more persons, who, to avoid a lawsuit, amicably settle their differences upon such terms as they can agree upon. *City of Anadarko v. Argo* 115

CONSTITUTIONAL LAW—See "Carriers," 3, 8, 9-11; "Commerce"; "Counties," 4; "Courts"; "Gas"; "Guardian and Ward," 7; "Injunction," 3-5; "Jury"; "Justices of the Peace"; "Mandamus"; "Municipal Corporations," 5, 12; "Schools and School Districts"; "Taxation," 1-3, 14, 15.

1. **Amendment of Constitution—Initiative Petition—Appeal from Secretary of State.** An appeal from a decision of the Secretary of State to the Supreme Court under Sess. Laws 1910-11, c. 107, is a transfer of the proceeding to the Supreme Court for trial *de novo*. *In re Initiative Petition No. 23, State Question No. 38* 49
2. **Same—Jurisdiction.** Under Sess. Laws 1910-11, c. 107, on appeal from the Secretary of State to the Supreme Court, that court secures jurisdiction of the Secretary of State and may, by its own

CONSTITUTIONAL LAW—Continued.

- mandate, compel him to comply with the statutory requirements. *Idem* 49
3. **Same—Sufficiency of Initiative Petition.** The mere fact that, of letters addressed to all the signers of an initiative petition at post offices given thereon, over 10 per cent. were returned undelivered, or that the circulators in their affidavits set forth more than one county as the residence of the signers, or failed to legibly write the names of the signers on the back of the petitions is insufficient to show irregularity. *Idem* 49
4. **Due Process of Law—Judicial Hearing for Insane Persons.** Comp. Laws 1909, secs. 3696-3720, relating to the commitment of insane persons by commissioners of insanity to the insane hospital, does not violate the due process clause of either the state or federal Constitutions. *Ex parte Dagley* 180
Ex parte Linke 192
5. **Governmental Powers — Encroachment on Judiciary—Disbarment Statutes.** Comp. Laws 1909, sec. 286, prohibiting disbarment of an attorney for acts involving moral turpitude, disconnected with his official duty until after conviction, is not violative of the Constitution, vesting judicial power in the various courts of the state. *In re Saddler* 510
6. **Practice of Law—Vested Rights.** The right to practice law is not a vested right, but a mere privilege. *State Bar Commission v. Sullivan* 745

CONSTRUCTION OF STATUTES—See "Statutes."

CONTEMPT—See "Carriers," 4, 5.

CONTINUANCE—See "Bail"; "Trial," 4, 5.

Grounds—Absence of Witness—Incompetent Evidence. A motion for a continuance based upon the absence of a witness is properly overruled where the affidavit supporting the motion shows that the facts it is alleged the witness would prove if present would be incompetent for the purpose offered. *Title Guaranty & Surety Co. v. Slinker* 128, 153

CONTRACTS—See "Attorney and Client," 1, 2; "Auctions and Auctioneers"; "Bills and Notes"; "Brokers"; "Carriers," 12-14; "Compromise and Settlement"; "Deeds"; "Drains"; "Evidence," 7; "Frauds, Statute of"; "Fraudulent Conveyances"; "Guardian and Ward," 5, 6; "Homestead"; "Indians"; "Infants"; "Insurance"; "Landlord and Tenant"; "Mines and Minerals"; "Municipal Corporations," 7; "Names"; "Partnership"; "Principal and Surety"; "Sales"; "Schools and School Districts"; "Vendor and Purchaser."

CONTRIBUTORY NEGLIGENCE—See "Negligence."

CONVERSION—See "Principal and Agent."

CONVEYANCES—See "Vendor and Purchaser."

CORPORATION COMMISSION—See "Carriers," 1-3; "Gas"; "Prohibition"; "Railroads"; "Telegraphs and Telephones."

CORPORATIONS—See “Banks and Banking”; “Carriers”; “Gas”; “Municipal Corporations”; “Railroads”; “Taxation,” 5-11; “Telegraphs and Telephones.”

COUNTIES—See “Drains”; “Fines”; “Taxation,” 1-4, 12, 13, 16; “Townships.”

1. **Commissioners—Road Expenses—Re-imbursement.** Under Comp. Laws 1909, sec. 7757, declaring that the right of way of any public road shall be paid for by the township, etc., a county commissioner having been authorized to survey a road, and having paid \$5 to a chain bearer, was entitled to reimbursement from a county. **Ticer v. State** 1
2. **Same.** Wilson’s Rev. & Ann. St. 1903, sec. 2408, held not to prohibit a county commissioner from advancing on the county’s credit the cost of the service of a chain bearer in surveying a road. **Idem** 1
3. **Commissioners’ Fees—Overseers of the Poor.** Territorial Laws 1901, c. 21, providing for the care of the poor, held, to repeal Act 1890 (St. 1890, secs. 4009-4029) relating to the subject under which county commissioners were entitled to receive compensation as overseers of the poor. **Idem** 1
4. **Officers—Change of Salary.** By virtue of that part of section 10, art. 23, of the Constitution, which provides that “in no case shall the salary or emoluments of any public official be changed after his election or appointment, or during his term of office,” the salary of a sheriff was governed by the act in force at the time of his election and qualification, and not by an act which became effective later. **Jones v. Louthan** 407
5. **Levy of Taxes—Validity—Injunction.** Where the excise board of a county without a petition, as is required by Laws 1911, c. 115, sec. 2, made a levy to eradicate cattle ticks in the county, which was situated partly above and partly below the quarantine line as established by the State Board of Agriculture, taxpayers can enjoin payment of warrants drawn on such fund; the levy being without authority of law. **Adams v. Board of Com’rs of Garvin County** 440
6. **Drainage District—Claims—Allowance—Review by County Commissioners.** The board of county commissioners as such has no authority or jurisdiction to re-audit and disallow a legal claim previously audited and allowed by such board while acting as drainage commissioners in the formation of a drainage district. **Board of Com’rs of Lincoln Co. v. Robertson** 616

COUNTY ATTORNEYS—See “Drains”; “Fines”; “Municipal Corporations,” 9.

COUNTY OFFICERS—See “Clerks of Courts”; “County Attorneys”; “Counties.”

COUNTY SEATS—See “Public Lands.”

COURTS—See “Attorney and Client,” 3-6; “Clerks of Courts”; “Constitutional Law”; “Guardian and Ward,” 5-8; “Indians,” 7; “Justices of the Peace”; “Removal of Causes”; “Venue.”

1. **Mayor’s Court—Appeal.** The mayor’s court of incorporated towns of the Indian Territory was not continued on admission of the

COURTS—Continued.

- state into the Union, and an appeal from a judgment rendered in such court before statehood by filing before the mayor, after admission of the state, an affidavit for appeal as allowed before the admission of the state, was void; the mayor being without jurisdiction in the premises. **Hillis v. Addle**..... 122
2. **Supreme Court—Appellate Jurisdiction—Tax Proceedings.** The Supreme Court is without jurisdiction to review, on appeal there-to, an order or judgment of a county court made in an appeal to such court from a decision and order of a county treasurer, assessing property for taxation, alleged to have been unlawfully omitted from the tax returns for certain years. **Shull v. State**..... 588
3. **Appellate Jurisdiction—Probate Matters.** Under the express provisions of Const. Schedule, sec. 2, and article 7, sec. 16, an appeal lies to the district court from the county court in probate matters in those cases in which an appeal was allowed under the statutes of Oklahoma Territory. **Barnett v. Blackstone Coal & Milling Co.** 724

COVENANTS—See “Evidence,” 7.

CREDITOR’S ACTIONS—See “Fraudulent Conveyances.”

CRIMINAL LAW—See “Bail”; “Fines”; “Injunction,” 7, 8; “Rape.”

CROPS—See “Landlord and Tenant”; “Customs and Usages.”

CUSTOMS AND USAGES—See “Master and Servant.”

Evidence—Admissibility—Crops. Where crops stand unsevered on leased land at the expiration of the term, and the lease is silent as to who is entitled to the waygoing crops, evidence of a general usage relating thereto is admissible. **Moore v. Coughlin**..... 429

D.

DAMAGES—See “Appeal and Error,” 64, 68; “Banks and Banking”; “Carriers,” 15-17; “Evidence,” 5, 6; “Libel and Slander”; “Master and Servant”; “Municipal Corporations,” 1, 2, 14-16; “Rape”; “Removal of Causes”; “Venue.”

1. **Measure of Damages—Real Property—Permanent and Temporary Injuries.** For injuries to real property susceptible of remedy by abatement, the owner may recover damages on account of the impaired use up to the time of suit. **City of Ardmore v. Orr**..... 305
2. **Same.** When a cause of injury to real property is abatable either by an expenditure of labor or money, it will not be regarded as permanent in determining the measure of damages therefor. **Idem**..... 305
3. **Same.** For permanent injuries to real property, the owner may recover the amount representing any permanent depreciation. **Idem**..... 305
4. **Personal Injuries—Elements of Compensation.** In an action for injuries to the person, plaintiff is entitled to recover the expenses of the cure, or reasonably attempted cure, the reasonable probable cost of future treatment, the loss of time up to the ver-

DAMAGES—Continued.

- dict, reasonable probable future loss from incapacity to labor, and suffering proximately caused by the injury. **Muskogee Electric Traction Co. v. Reed**..... 334
5. **Same—Excessive Damages.** Where plaintiff's right thigh was broken, resulting in shortening of the limb, and the question of her ultimate recovery was problematical, an award of \$5,000 damages was not excessive. **Idem**..... 334
6. **Same.** A verdict for \$2,000 held not excessive, where plaintiff's injuries were apparently permanent, would probably render her a cripple for life, and greatly decreased her earning capacity; she being a music teacher 42 years of age and earning \$12 or \$15 per week at the time of her injury. **Town of Fairfax v. Giraud**... 659

DEATH—Injuries—See "Master and Servant."

DEEDS—See "Champerty and Maintenance"; "Estoppel"; "Evidence," 7; "Fraudulent Conveyances"; "Homestead"; "Indians"; "Pleading," 9; "Trial," 2; "Vendor and Purchaser."

1. **Definition.** A deed is defined to be a written instrument containing a contract or agreement, which has been delivered by the party to be bound, and accepted by the obligee or covenantee. **Couch v. Addy**..... 355
2. **Validity—Delivery—Acceptance.** To constitute a valid deed, not only must there have been an intention on the part of the grantors to deliver, but the grantee must accept the same in person, or by some one whom he has authorized to accept for him, or whose conduct he subsequently ratifies. **Idem**..... 355

DEFAULT JUDGMENT—See "Appeal and Error," 74.

DELIVERY—See "Bills and Notes"; "Deeds"; "Frauds, Statute Of"; "Homestead"; "Sales," 4-7.

DEMURRER—See "Limitation of Actions"; "Pleading," 3, 6, 12, 13; "Trial," 3.

Demurrer to Evidence—See "Forcible Entry and Detainer"; "Trial," 2.

DEPOSITS—See "Banks and Banking."

DESCENT AND DISTRIBUTION—See "Indians."

"**Issue**"—**Child by First Marriage.** Where decedent who had been twice married, died, leaving a widow, and child by the first marriage, and his property had been acquired by the joint industry of himself and the second wife, the child by the first marriage constituted "issue" within Comp. Laws 1909, sec. 8985, relating to distribution of assets of estates. **Schafer v. Ballou**..... 169

DIPPING OF CATTLE—See "Carriers," 6-8.

DIRECTION OF VERDICT—See "Trial," 1.

DISBARMENT—See "Attorney and Client"; "Constitutional Law," 5, 6; "Jury."

DISCRETION OF TRIAL COURT—See "Appeal and Error," 67-70; "Injunction," 9; "New Trial."

DISMISSAL—See "Appeal and Error," 20, 21, 25-27, 48, 54.

DORMANT JUDGMENT—See "Judgment."

DRAINS—See "Counties," 6; "Jury."

1. **Appeal—Burden of Proof.** A landowner, who excepts to the action of the viewers upon the third ground set forth in section 3057, Comp. Laws 1909, or upon the ground that his land was assessed too much, on trial of his appeal in the district court, has the burden of that issue. *Catron v. Deep Fork Drainage Dist. No. 1* 447
 2. **County Attorneys—Commissioners for Drainage District—Employment of Attorney—Authority.** A board of county commissioners acting as commissioners for a drainage district has authority to employ attorneys in order to prosecute or defend the formation of such district, and it is not part of the official duty of the county attorney of the county within which such district is located to act as such. *Board of Com'rs of Lincoln Co. v. Robertson* 616
- DUE PROCESS OF LAW**—See "Constitutional Law," 4.

E.

EIGHT-HOUR DAY—See "Municipal Corporations," 7.

ELECTIONS—See "Clerks of Courts"; "Constitutional Law," 1-3; "Municipal Corporations," 4; "Schools and School Districts."

1. **Validity—Place of Holding.** Requirements of the law as to the place of holding an election are generally mandatory, and an election conducted at any other place is void. *Goree v. Cahill*..... 42
2. **Same—Mandamus to Canvass.** Where an election was not held at the regular polling place, but at the residence of a candidate, and no notice was posted as to the place of holding the election, and only thirteen electors of the town, which had five wards, participated therein, mandamus to compel the county election board to canvass such votes was erroneously allowed; the election being void. *Idem* 42
3. **Canvassing Boards—Correction of Errors.** Where precinct election returns were not authenticated by signatures of two of the counters as required by Session Laws 1911, c. 106, sec. 7, it was the duty of the board of county canvassers to permit their correction or treat the returns as corrected and canvass same. *Moren v. Nichols*..... 283
4. **County Board—Opening Returns.** Under Sess. Laws 1911, c. 106, sec. 8, county canvassers had no authority to open the envelope returned from a precinct containing the "voted ballots" and "tally sheets," in order to search for the certificate of returns which should have been inclosed in a separate envelope labeled, "Returns," that the vote of the precinct might be canvassed. *Idem* 283
5. **Contests—Fraud—Evidence.** One who seeks to have an election declared void and set aside upon the ground that by irregularities and fraudulent misconduct of the election officers in some pre-

ELECTIONS—Continued.

cinets persons were prevented from voting must allege and prove that such persons were qualified voters, and that the number thereof was sufficient that if they had voted and had cast their vote for the next highest candidate the result of the election would have been changed. **Snyder v. Blake**..... 294

EMPLOYER'S LIABILITY ACT—See "Removal of Causes."

EQUALIZATION—See "Taxation."

EQUITY—See "Appeal and Error," 35; "Estoppel"; "Execution"; "Fraudulent Conveyances"; "Guardian and Ward," 6; "Injunction"; "Parties"; "Receivers."

ERROR, WRIT OF—See "Appeal and Error."

ESCROWS—See "Bills and Notes."

ESTATES—See "Descent and Distribution"; "Indians."

ESTOPPEL—See "Limitation of Actions."

1. **Equitable Estoppel—Grounds.** A person may waive a right by conduct or acts which indicate an intention to relinquish it, or by such failure to insist upon it that the party is estopped to afterwards set it up against his adversary. **Scott v. Signal Oil Co.** 179

2. **By Deed—Rights Subsequently Acquired.** Where R. sold and conveyed to B. by warranty deed a town lot to which he had no title, and thereafter acquired by warranty deed from H. a perfect title thereto, held that the same inured *eo instante* to the benefit of his grantee, and that the lien of a judgment, rendered and entered against the grantor prior to the first deed, did not attach to the land. **Brown v. Barker**..... 498

EVIDENCE—See "Adoption"; "Appeal and Error," 34, 35, 51, 56-66, 71, 72; "Attorney and Client," 8-10; "Carriers," 3, 5; "Continuance"; "Customs and Usages"; "Forcible Entry and Detainer"; "Master and Servant"; "New Trial"; "Rape"; "Sales," 7; "Taxation," 5, 6; "Trial," 1, 2; "Witnesses."

1. **Admissions—Compromise.** Admissions made expressly for the purpose of effecting a compromise of a matter under controversy, if not accepted, cannot be proved against the party making them; but, where it does not appear that such admissions were made in confidence of a compromise, they will be admissible in evidence. **City of Anadarko v. Argo**..... 115

2. **Adoption—Best Evidence.** Where, under provisions of a statute, an adoption is effected by order or decree of the court, the records of such court constitute the best evidence by which such adoption may be established. **Coombs v. Cook**..... 326

3. **Same—Loss of Record.** Where the records of the court have been destroyed by fire, proof of the contents of such records by parol testimony may then be made, and circumstantial evidence introduced, including acts and declarations of an adopting parent, relative to such adoption, for the purpose of establishing the adoption. **Idem** 326

EVIDENCE—Continued.

4. **Opinion—Nonexperts—Sanity.** Where nonexpert witnesses testify that they have observed the conduct of a person whose sanity is in question, and state the facts which they observed and upon which they base their opinions, they may give their opinions as to the sanity of such person. *Conwill v. Eldridge*..... 537
5. **Damages to Cattle—Witnesses—Opinions.** Where a witness had been a cattle raiser or dealer, and had priced cattle at the time those in question, alleged to have been damaged, were placed on the market, he was competent to testify as to the value or damage to the cattle in question. *St. Louis & S. F. R. Co. v. Bilby*..... 589
6. **Same—Weight of Evidence for Jury.** The weight of opinion of a witness as to the value or damage to cattle by rough handling during transportation, or his statement as to the price the cattle would bring in the market, was for the jury. *Idem*..... 589
7. **Parol Evidence—Written Contract.** In an action of covenant, parol evidence is inadmissible to show at the time of the delivery of the deed containing the covenant against all incumbrances that the grantee agreed to take the land subject to an outstanding lease. *Mandler v. Starks*..... 809

EXCEPTIONS—See “Appeal and Error,” 9-14, 33, 35, 64.

EXCISE BOARDS—See “Taxation.”

EXECUTION—See “Parties.”

Injunction—Remedies. A motion to quash an execution was cumulative, and did not oust a court of equity of its jurisdiction, in an action to restrain the execution of the judgment, on the ground that it created no lien on the land levied on. *Rader v. Gvozdanovic*.... 421

EXECUTION SALES—See “Exemptions.”

EXEMPTIONS:

1. **Failure to Claim Exemptions—Excuse—Accident.** Under the rule that a debtor is excused by unavoidable accident in failing to make a claim for exemptions, an “accident” is an event which is unusual and unexpected, or the happening of an event without the concurrence of the will of the person by whose agency it was caused. *Hocker v. Carroll*..... 290
2. **Same—Proceedings to Protect—Notice of Claim.** Where a United States commissioner, after issuing an execution, absented himself from his district so that the judgment debtor could not give notice of his claim of exemption, and at the execution sale the debtor gave notice thereof, he can recover possession from the purchaser. *Idem*..... 290
3. **Piano—“Household and Kitchen Furniture.”** A piano comes within the term of “household and kitchen furniture,” as the same is used in our personalty exemption statute (section 3346, Comp. Laws 1909; Sess. Laws 1905, p. 255). *Cook v. Fuller*.... 339

EXHIBITS—See “Pleading,” 6-9.

EXPERT EVIDENCE—See “Evidence,” 4.

F.

FEES—See "Counties," 3; "Fines."

FINDINGS—See "Appeal and Error," 56-59, 65; "Public Lands"; "Taxation," 11; "Trial," 7.

FINES:

1. **Disposition of Money—Rights of County—Violations of Anti-Trust Laws.** Where, prior to admission of the state, suit was brought on relation of the county attorney under Wilson's Rev. & Ann. St. 1903, c. 83, to enjoin an unlawful combination in restraint of trade, in which the Attorney General intervened in the name of the state, and recovered \$75,000 as a fine imposed for violating Comp. Laws 1909, c. 113, art. 1 (Laws 1907-08, pp. 750-757), and the trial court ordered part of the fine paid to the county attorney and his successor, the board of county commissioners of the county had no interest in the fine under Comp. Laws 1909, c. 25, art. 62 (section 2852), entitled "Crimes and Punishment," and could not recover the same. **Board of County Com'rs of Garfield County v. Huett**..... 713
2. **Same—Statutory Provisions.** Comp. Laws 1909, c. 25 (section 2852), requiring all fines imposed under that chapter to be paid into the county treasury, did not use the word "chapter" in the sense of "Code" or "criminal statute," and did not include fines imposed under chapter 113 (sections 8800-8822) entitled "Trusts" and "Combinations." **Idem**..... 713

FORCIBLE ENTRY AND DETAINER:

Evidence—Sufficiency. Where, in forcible entry and detainer, giving the evidence its strongest probative force, there is no evidence reasonably tending to prove that defendant was in possession of the premises in controversy at the commencement of the suit, held, that the court did not err in sustaining a demurrer to the evidence at the close of plaintiffs' testimony. **Maples v. Smythe** 469

FORFEITURE—See "Bail."

FRAUD—See "Elections"; "Names"; "Municipal Corporations," 8-10; "Prohibition"; "Sales," 1; "Vendor and Purchaser."

FRAUDS, STATUTE OF:

1. **Agreements Relating to Realty—Appointment of Agent.** An agreement for the sale of real property, or of an interest therein, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, and subscribed by the party sought to be charged. **Schechinger v. Gault**..... 416
2. **Same—Operation and Effect of Statute.** If a promisor or vendor is ready and willing to perform and carry out the sale of the land in accordance with his parol agreement, he cannot, as a rule, be compelled to give up or pay for the consideration received, on the sole ground that the agreement is invalid because of the statute of frauds, and cannot be compelled to perform. **Idem** 416

FRAUDS, STATUTE OF—Continued.

3. **Sale of Chattels—Delivery.** A delivery and acceptance, at any subsequent time, of any part of the goods or chattels which are the subject of an oral agreement and within the statute of frauds takes the contract out of the statute of frauds and makes valid the entire contract. **Conelly Const. Co. v. Royce**..... 425

FRAUDULENT CONVEYANCES:

- Creditor's Action—Statutes.** Where a father conveyed certain real estate to his daughter to expedite a sale, and, the sale not being made, the daughter reconveyed the property to the father, it was not subject to the claim of a judgment creditor of the daughter whose judgment was obtained after the reconveyance, merely because, by Comp. Laws 1909, sec. 7267, the daughter was at liberty to refuse to carry out the parol agreement to reconvey. **Tonkawa Nat. Bank v. Dyson**..... 572

FREE PASSES—See “Carriers,” 9-11.

FURNITURE—See “Exemptions.”

G.

GARNISHMENT—See “Appeal and Error,” 21.

GAS:

1. **Supply to Private Consumers—Regulation of Charges.** Section 18, art. 9, of the Constitution does not confer upon the Corporation Commission jurisdiction and power to prescribe the rates and charges for service to be rendered by a gas company furnishing gas within the limits of a city under franchise from the city, and that, too, whether the city has authority conferred upon it by Comp. Laws 1909, sec. 693, to regulate the charges therefor or not. **Shawnee Gas & Elec. Co. v. Corporation Commission** 454
2. **Same.** Comp. Laws 1909, sec. 8812, defining trusts and unlawful combinations and regulating the same, does not confer on the State Corporation Commission jurisdiction to establish rates for service rendered by a gas company within city limits. **Idem** 454

GIFTS—See “Municipal Corporations,” 13.

GRADUATED LAND TAX—See “Taxation,” 14, 15.

GUARDIAN AND WARD—See “Appeal and Error,” 72; “Indians,” 7; “Judges”; “Pleading,” 5.

1. **Guardian's Account—Settlement—Impeachment by Guardian.** A guardian will not be permitted to testify in a manner to impeach the final settlement of his guardianship accounts, regularly made by the county court. **Title Guaranty & Surety Co. v. Slinker** 128, 153
2. **Guardian's Bond—Sureties—Final Settlement—Conclusiveness.** Sureties on a guardian's bond are, in the absence of fraud, concluded by the decree of the county court, duly entered on a hear-

GUARDIAN AND WARD—Continued.

- ing on an accounting, or final settlement, as to the amount of the principal's liability, although the sureties are not parties to the accounting. *Idem* 128, 153
3. **Settlement of Accounts—Revocation of Letters.** It is within the province of the county court to require guardians to settle the accounts of their wards, even after the letters of guardianship have been revoked. *Idem* 128, 153
4. **Guardian's Bond—Action by Minor.** A minor by his legal guardian may maintain an action on the official bond of a former guardian, although the bond, which was executed prior to statehood, was made payable to the United States of America. *Idem* 128, 153
5. **Lease of Lands—Confirmation by Court—Necessity.** Under Ind. T. Ann. St. 1899, secs. 2402, 2405, an order of court, on application of a guardian, directing the lease of the ward's real estate for investment to a named person under specified terms, constituted a confirmation of the lease, which, if irregular, was not subject to collateral attack. *Cowles v. Lee* 159
6. **Same—Lease Extending Beyond Minority—Validity.** Under Ind. T. Ann. St. 1899, sec. 2398, empowering the United States courts sitting as probate courts to authorize a guardian to lease the lands of a minor, and sections 2405-2407, authorizing the probate court to lease for reinvestment, a lease of a minor's land by order of court was valid, though extended beyond minority; and the United States courts, sitting as courts of chancery, could approve it. *Idem* 159
7. **Sale of Ward's Land—Jurisdiction of County Court.** Under Const. art. 7, secs. 12, 13, a county court having jurisdiction of the person and estate of a minor may order the sale of the land of the minor situated in another county. *Dewalt v. Cline* 197
8. **Same.** The county court on sale of the land of a minor in another county may confirm the sale and order a guardian's deed. *Idem* 197

H.

HABEAS CORPUS:

- Insane Persons—Discharge.** For the purpose of the hearing, it being admitted that the person was not only at the time of commitment but is also now insane, whose release from the asylum was sought solely on the ground that the statute under which she was held was void, such party is not entitled, as a matter of right, to be discharged upon that ground alone. *Ex parte Dagley* 180
Ex parte Linke 192

HARMLESS ERROR—See "Appeal and Error", 71, 72.

HEALTH INSURANCE—See "Insurance."

HEIRS—See "Descent and Distribution"; "Indians."

HIGHWAYS—See "Counties," 1, 2; "Prohibition"; "Railroads."

HOMESTEAD—See “Indians,” 3; “Parties”; “Trial,” 1; “Vendor and Purchaser.”

Deed—Delivery Without Consent of Wife—Effect. Where husband and wife sign a deed to the homestead of the family under an agreement that the same shall not be delivered to the grantee named therein, and the husband, without the consent of the wife, delivers the deed to the grantee, who has notice of the agreement, the deed may be avoided by the wife after the death of her husband.
Couch v. Addy

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HUSBAND AND WIFE—See “Homestead”; “Indians,” 2.

HYPOTHETICAL CASES—See “Appeal and Error,” 4.

I.

INCUMBRANCES—See “Evidence,” 7.

INDIANS—See “Champerly and Maintenance”; “Mines and Minerals”; “Pleading,” 9; “Trial,” 2.

1. **Creek Lands—Alienation by Heirs.** Under the Creek supplemental agreement, Act Cong. June 30, 1902, secs. 6-8, 16, and Act Cong. April 21, 1904, sec. 1, the land allotted to a father and mother on August 15, 1902, as heirs of their son, a duly enrolled Creek freedman who died a minor July 2, 1899, passed to the father and mother free from restrictions and was alienable on April 8, 1905. **Rentle v. McCoy**

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2. **Deeds—Validity—Subsequently Acquired Title.** Where a full-blood member of the Creek tribe of Indians, prior to the removal of his restrictions, joined with his wife in the execution of a deed to a portion of his allotment, and, after removal of restrictions, executed a deed to the same land to his wife, the first deed being void, the subsequently acquired title did not inure to the benefit of her grantee. **Berry v. Summers**

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3. **Lands—Homesteads—Alienation.** Where P., a freedman member of the Creek Tribe of Indians who had selected an allotment, died in the month of June, 1902, and on March 26, 1904, there were delivered to his heirs two deeds for his said allotment, denominating portions of it as homestead and surplus, and on September 13, 1905, the mother, as heir of the said decedent, executed a deed to the said allotment, homestead and surplus, held, that the homestead character never attached to any portion of the said allotment, and under and by virtue of the terms of the act of April 21, 1904 (33 St. at L. 189), the restrictions, if any existed, were removed for its alienation by the heirs of the deceased. **Manuel v. Smith**

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4. **Allotment—Descent and Distribution.** Where a member of the Creek Tribe of Indians, entitled to be enrolled under section 21 of Act of Congress, approved June 28, 1899, entitled, “An act for the protection of the people of the Indian Territory and for other purposes” (30 St. at L. p. 495), died subsequent to the first day of April, 1899, but before having received the allotment of lands to which he was entitled as a member of said tribe of Indians, said lands, by reason of section 28 of the Original Treaty

INDIANS—Continued.

- with the Creek Tribe of Indians (31 St. at L. p. 861), descended to his heirs, free from restrictions upon alienation imposed by section 7 of said Original Creek Treaty and by section 16 of the Supplemental Treaty with the Creek Tribe of Indians (32 St. at L. p. 500), and a warranty deed, executed by the heirs after the allotment of said lands to them, conveyed the fee simple title thereto. **Deming Inv. Co. v Bruner Oil Co.**..... 395
5. **Cherokee Allotments—Conveyance—Validity.** Where an adult, not of Indian blood, but a member of the Cherokee Tribe, prior to his allotment conveyed certain land, a part of the public domain of the Cherokee Indians afterwards selected by him as his surplus allotment, Act Cong. April 24, 1904, removing restrictions on the alienation of the land of such allottees, did not apply till after he had selected his allotment. **Bledsoe v. Wortman** 261
6. **Same—Invalidity—After-Acquired Title.** Mansf. Dig. Ark. sec. 642, providing that, on conveyance of real estate by a person not having the legal title, a subsequent after-acquired title shall pass to the grantee, has no application to a conveyance by an Indian where at the time it was invalid, being expressly prohibited by law, though thereafter the grantor obtained title, and was authorized by law to convey. **Idem.**..... 261
7. **Lands—Lease by Guardian.** Leases of allotments of Indian minors in the Five Civilized Tribes confirmed and approved by the trial court in that jurisdiction since April 26, 1906, are not subject to the approval or disapproval of the Secretary of the Interior; but the orders of the court confirming and approving them are final. **Cowles v. Lee**..... 159
8. **Oil and Gas Lease—Disaffirmance—Removal of Restrictions.** Where restrictions on alienation were removed from a Cherokee allottee pending approval by the Secretary of the Interior of a mining lease executed by the allottee to defendant, whereupon his protest against the approval of the lease was denied and the lease approved, he was not entitled to have the same set aside as a cloud on his title. **Almeda Oil Co. v. Kelley**..... 525
9. **Assignment of Oil and Gas Leases—Registration.** The recordation laws of Arkansas, extended to Indian Territory, do not require the assignment of an oil and gas lease by a citizen of the Cherokee Nation prior to statehood to be recorded to give it validity. **Scott v. Signal Oil Co.** 172
10. **Lease by Allottee—Conditional Approval—New Proposal—Failure of Contract—Cancellation.** Where an oil and gas lease executed by an Indian landlord to a corporation tenant, subject to the approval of the Secretary of the Interior, was approved, conditioned upon the lessee and its sureties executing certain documents containing conditions and terms which the lessee rejected, held, that such conditional approval was a new proposal, which, when not accepted by the lessee, resulted in a failure of contract, and delay of action on the part of the lessee did not result in creating one. **Davis v. Selby Oil & Gas Co.**..... 254
11. **Choctaws and Chickasaws—Leases—Validity.** Under Act June 28, 1898, no allottee of the Choctaw or Chickasaw Tribes could lease

INDIANS—Continued.

- his allotment for a longer period than five years, without privilege of renewal. **Tate v. Stone** 369
12. **Same.** Under Act June 28, 1898, a lease of an allotment by a Choctaw or Chickasaw Indian, not evidenced in writing and recorded within three months after execution, is void; and the lessee acquires no rights by entry or holding thereunder. **Idem** 369

INDORSEMENT—See "Bills and Notes."

INFANTS—See "Adoption"; "Guardian and Ward."

1. **"Necessaries"—Services of Attorney.** Where action was brought in the name of a minor, by direction of her next friend, to protect title to real estate, the counsel could not recover, in an action against the minor; such services not being necessities. **Grissom v. Beidleman** 343
2. **Disaffirmance of Contracts—Effect.** The disaffirmance of a contract by an infant renders it void *ab initio*, and any one may take advantage of such disaffirmance. **Idem** 343
3. **Same.** Any act of an infant, showing unequivocally a renunciation of a contract made during minority, is sufficient to avoid it. **Idem** 343

INITIATIVE AND REFERENDUM—See "Constitutional Law," 1-3.

INJUNCTION—See "Appeal and Error," 2, 69, 70; "Counties," 5; "Execution"; "Municipal Corporations," 13; "Parties"; "Pleading," 2; "Taxation," 16.

1. **Petition—Irreparable Injury.** Petition examined, and held that a threatened irreparable injury for which the law affords no adequate remedy is disclosed on its face, and that the same properly invokes the aid of a court of equity in the absence of an allegation that defendant is insolvent. **Gilbreath Gas Co. v. Lindsey** 235
2. **Petition—Verification—Statutes.** Under Comp. Laws 1909, sec. 5757, providing that an injunction may be granted when it satisfactorily appears to the court or judge, by the affidavit of the plaintiff or his agent, that plaintiff is entitled thereto, a petition verified on information and belief only is insufficient. **Idem** 235
3. **Abolition of Writ—Effect of Statehood.** That part of section 5755, Comp. Laws 1909, abolishing the writ of injunction was not continued in force by section 2 of the Schedule of the Constitution at the erection of the state. **Murphy v. Fitch** 364
4. **Same—Authorization of Writ.** The writ of injunction was made available at the erection of the state by sections 2 and 10, art. 7, of the Constitution. **Idem** 364
5. **Same—Statutory Provisions.** The statutory provisions as contained in sections 5755, 5756, and 5757, Comp. Laws 1909, except that part of section 5755 which abolishes the writ of injunction, were continued in force after the erection of the state by section 2 of the Schedule of the Constitution, and are cumulative remedies. **Idem** 364

INJUNCTION—Continued.

6. **When Granted—Possession of Premises.** Where certain lots were in possession of F., claiming title thereto, and the same are sought to be taken forcible possession of by M., who claimed an adverse title, F.'s possession may be preserved until the final determination as to the title by means of injunction. *Idem* 364
7. **Prosecution for Violation of Ordinance—Validity.** A prosecution for violation of an ordinance will not be enjoined on the ground that the ordinance is void; such defense being available in a court of law. *Yale Theater Co. v. City of Lawton* 444
8. **Same—Irreparable Injury.** Equity will restrain criminal proceedings under an invalid ordinance, where they would destroy property rights and inflict irreparable injury. *Idem* 444
9. **Dissolution—Discretion of Court.** The dissolution of a temporary injunction is in the discretion of the court. *Idem* 444

INSANE PERSONS—See "Constitutional Law," 4; "Evidence," 4; "Habeas Corpus"; "Jury."

INSOLVENCY—See "Banks and Banking"; "Receivers."

INSTRUCTIONS—See "Appeal and Error," 62, 68; "Justices of the Peace"; "Municipal Corporations," 2; "Trial," 6.

INSURANCE:

Health Insurance—Construction of Policy. Where a health insurance contract provided that it should not cover disability resulting from any chronic disease or diseases other than in acute and fully developed form, insured, afflicted with chronic nephritis, could not recover. *Kingkade v. Continental Casualty Co.* 99

INTERSTATE COMMERCE—See "Carriers," 12-14; "Commerce."

INTERURBAN RAILROADS—See "Carriers," 3.

J.

JUDGES—See "Appeal and Error," 9, 13, 38-40; "New Trial"; "Public Lands."

Disqualification—Interest. Section 2012, Comp. Laws 1909, which provides that "no judge of any court of record shall set in any cause or proceeding in which he may be interested, or in the result of which he may be interested," does not preclude a county judge from acting in the matter of the settlement of a guardian's accounts whose letters of guardianship have been revoked because he acted as attorney for the guardian in the matter of his appointment. *Title Guaranty & Surety Co. v. Slinker* 128, 153

JUDGMENT—See "Appeal and Error," 3, 23, 28, 29, 45, 46, 74; "Estoppel"; "Execution"; "Fraudulent Conveyances"; "Guardian and Ward," 1, 2; "Limitation of Actions"; "Parties."

Judgment on Pleadings—See "Appeal and Error," 1; "Pleading," 8, 9, 11.

JUDGMENT—Continued.

1. **Vacation—Grounds.** Where a judgment has been entered upon stipulation of the parties to a proceeding, the court having jurisdiction, not only of the subject-matter, but also of the parties, and power to enter the judgment, the same will not thereafter, at the same term at which it was rendered, be set aside without a showing that some injustice has been done to the party against whom the judgment was rendered. *Starr v. Tennant* 125
2. **Vacation—Judgment by Consent.** Where a judgment was entered on stipulation and approved by all the parties and their counsel, the court properly refused to set it aside on motion of some of the parties only, in the absence of fraud in procuring a consent judgment. *United States Const. Co. v. Armour Packing Co.* 177
3. **Validity—Persons Concluded—Judgments Against School Boards.** The owner of several judgments against a board of education is not concluded by a judgment against their validity in a suit by the board against its treasurer to mandamus him to pay the judgments in which their dormancy was directly involved, though the owner assumed the defense of the suit. *In re Board of Education of City of Perry* 733

JURISDICTION—See “Appeal and Error,” 17, 18; “Attorney and Client,” 3; “Constitutional Law,” 2; “Courts”; “Gas”; “Guardian and Ward,” 7; “Removal of Causes.”

JURY—See “Appeal and Error,” 7, 8; “Carriers,” 4.

1. **Right to Jury Trial.** The right of trial by jury declared inviolate by section 19, art. 2, of the Constitution, except as modified by it, means the right as it existed in the territory of Oklahoma at the time of the adoption of the Constitution. *Ex parte Dagley* 180
Ex parte Linke 192
2. **Same—Insane Persons.** The law in force in the territory of Oklahoma at the time of the admission of the state did not give persons, charged with being insane for the purpose of being committed to an insane hospital or asylum of the state, a right of trial by jury on the issue as to insanity. *Idem* 180, 192
3. **Appeal from Drain Commissioners—Trial by Jury.** A landowner, who appeals from the decision of the board of commissioners upon his exceptions to the action of the viewwers, on the ground that they had assessed his land too much, pursuant to Comp. Laws 1909, sec. 3057, is not entitled to a trial by jury upon that issue in the district court. *Catron v. Deep Fork Drainage Dist. No. 1* 447
4. **Right to Jury Trial—Disbarment Proceeding.** A disbarment proceeding under Comp. Laws 1909, sec. 267, being a civil proceeding, the accused cannot demand a trial by jury as a matter of right. *State Bar Commission v. Sullivan* 745

JUSTICES OF THE PEACE:

Appeal—Instructions in County Court. Where cases are commenced in a justice's court after erection of the state and appealed to the county court under Const. art. 7, sec. 12, the judge of such court can instruct the jury as to the law. *Tate v. Stone* 369

L.

LABOR—See “Municipal Corporations,” 7.

LANDLORD AND TENANT—See “Customs and Usages”; “Guardian and Ward,” 5, 6; “Indians,” 7, 8, 10-12; “Mines and Minerals.”

1. **Rights of Parties—Waygoing Crops.** Where the covenants of a lease for years require the tenant to plant and cultivate in the last year of his term, a lien being reserved for rent, the lease gives the outgoing tenant the waygoing crop. **Moore v. Coughlin** 429
2. **Lien on Crops—Liability of Purchaser.** A landlord entitled to rent may recover from the purchaser of any crop grown by the tenant, who has notice, either actual or constructive, of the lien, the value of the crop purchased, to the extent of the rent due. **Butler v. Corey** 471

LEASES—See “Evidence,” 7; “Landlord and Tenant.”

LIBEL AND SLANDER—See “Attorney and Client,” 5, 6, 9.

1. **Privileged Communications.** Where a publication is absolutely privileged, that determines the right to an action for the libel. **Tuohy v. Halsell** 61
2. **Same—Legislative Investigations of Charges Against Appointees.** An investigation by a Senate committee of charges against one appointed to office by the President, and whose appointment has been sent to the Senate for confirmation, is a “proceeding authorized by law” within the meaning of Wilson’s Rev. & Ann. St. 1903, sec. 2239. **Idem** 61
3. **Same—Affidavits.** In the absence of malice, defendant was not guilty of libel within Wilson’s Rev. & Ann. St. 1903, sec. 2239, where he sends to the Department of Justice for use before a Senate committee an affidavit containing criminatory matter against one who has preferred charges against the fitness of another for office to which he has been appointed by the President. **Idem** 61
4. **Same—Questions for Court—Direction of Verdict.** Where a publication is conditionally privileged, it is a matter of law for the court to determine whether there is any evidence of malice, and, if there is none, to direct the verdict for defendant. **Idem**..... 61

LIBRARIES—See “Municipal Corporations,” 13.

LICENSES—See “Prohibition.”

LIENS—See “Attorney and Client,” 1, 2; “Banks and Banking”; “Chattel Mortgages”; “Estoppel”; “Landlord and Tenant”; “Municipal Corporations,” 6.

LIMITATION OF ACTIONS—See “Attorney and Client,” 6; “Municipal Corporations,” 10.

1. **Raising Defense of Statute—Demurrer.** Where a petition upon its face shows that the cause of action is barred by the statute of limitation, it is proper to sustain a demurrer thereto upon that ground. **Territory ex rel. v. Woolsey**..... 545

LIMITATION OF ACTIONS—Continued.

2. **Agreement to Waive—Estoppel.** Where a board of education entered into a valid agreement to apply the judgment fund to judgments in order of entry, and complied therewith, it could not, after the expiration of the statutory period when the judgment became dormant for failure to issue execution, plead limitations as a bar to those judgments not yet reached for payment under the agreement. *In re Board of Education of City of Perry*.....

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LIVE STOCK—See “Animals.”

LUNATICS—See “Constitutional Law,” 4; “Habeas Corpus”; “Jury.”

M.

MALICE—See “Libel and Slander.”

MANDAMUS—See “Elections”; “Judgment.”

Issue of Bonds—Public Utility. Where, with the proceeds of bonds issued pursuant to section 27, art. 10, of the Constitution, a bridge is intended to be constructed upon a street closed to traffic to enable the city to acquire land upon which to erect abutments, and opened again to traffic after the same is completed, the approaches over its tracks to be supplied and owned by a railroad, held that, as the proposed structure, when completed, would be a street improvement, and not a public utility owned exclusively by the city, within the meaning of said section and article, the Bond Commissioner will not be required by mandamus to approve said bonds. *In re Bonds of City of Guthrie*

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MASTER AND SERVANT:

Injuries to Railroad Engineer—Evidence—Customs. In a suit for the death of an engineer by collision with a switch engine, it was error to exclude evidence of a custom that a rule requiring decedent to take a side track, which he failed to do, had been abandoned and disregarded with knowledge of defendant employer. *Clemens v. St. Louis & S. F. R. Co.*

667

MAYOR'S COURTS—See “Courts.”

MEASURE OF DAMAGES—See “Carriers,” 17.

MEDICINE—See “Prohibition.”

MINES AND MINERALS—See “Indians,” 8.

1. **Assignment of Leases—Registration.** The recordation laws of the state of Arkansas extended to and put in force in the Indian Territory do not require the assignment of an oil and gas lease executed by a citizen of the Cherokee Nation prior to statehood to be recorded in order to give it validity. *Scott v. Signal Oil Co.*
2. **Same—Consent of Lessor to Assignment.** The lessor in a departmental oil and gas lease, who, after notice of assignment of it with the approval of the Secretary of the Interior, accepted the rentals and royalties due her for several years, waived her rights under the clause providing that no assignment could be made without the consent of the lessor and the Secretary of the Interior. *Idem*

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MINORS—See “Guardian and Ward”; “Infants.”

MONOPOLIES—See “Fines”; “Gas.”

MOOT QUESTIONS—See “Appeal and Error,” 4.

MORTGAGES—See “Chattel Mortgages.”

MUNICIPAL CORPORATIONS—See “Counties”; “Courts”; “Gas”; “Injunction,” 7, 8; “Mandamus”; “Public Lands”; “Schools and School Districts”; “Taxation,” 16; “Townships.”

1. **Street Grading—Surface Water—Injury to Abutting Premises—City’s Liability.** Where a city in grading streets diverted surface water, and negligently failed to provide sufficient sewer outlets for it, causing the same to back up and overflow abutting premises which were above the established grade, the city was liable to the abutting owner for the damages sustained. **City of Ardmore v. Orr** 305
2. **Same—Measure of Damages.** Where a city in improving streets diverted surface water, so that the sewers provided were insufficient, and it overflowed and damaged abutting property, the defect being remedial, it was error to authorize the jury to consider as an element of plaintiff’s damages, loss of future rents, and depreciation in value. **Idem** 305
3. **Councilmen.** Under the provisions of chapter 136, p. 316, Sess. Laws 1910-11, and the acts of which the same is an amendment, two councilmen are provided for each ward in all cities of the first class. **State ex rel. v. Perkins** 317
4. **Same—Unexpired Term.** Where no election is held at the time fixed by law, a city councilman, appointed to fill an unexpired term, holds until his successor is duly elected and qualified. **Idem** 317
5. **Local Improvements—Assessments.** The Organic Act of the territory of Oklahoma, sec. 6, providing that property shall be taxed in proportion to its value, does not apply to assessments for local improvements. **Block v. Patrick** 408
6. **Same—Constitutionality of Act.** The statute authorizing trustees of an incorporated town to construct sidewalks and gutters and assess the costs on the abutting property, and to issue a tax warrant for the cost and making it a lien against the property, held constitutional. **Idem** 408
7. **Payment of Laborers—“Emergency”—Eight-Hour Day.** The proviso contained in section 4057, Comp. Laws 1909 (Act March 22, 1909 [Laws 1909, c. 39, art. 4]), is an “emergency” measure; and it is not contemplated thereby that a man employed by a city as an engineer at its waterworks plant should recover for extra time over eight hours provided for therein, where the same is devoted by him to performance of his ordinary and usual duties. **Robinson v. City of Perry** 475
8. **Fraudulent Claims—Settlement—Taxpayers’ Action Against Officers.** An action may be maintained in the name of the state on relation of one or more resident taxpayers of a city against an officer who has transferred property of the city or paid out its money in settlement of a fraudulent claim on conditions specified by Comp. Laws 1909, secs. 7413, 7414. **Territory ex rel. v. Woolsey** 545

MUNICIPAL CORPORATIONS—Continued.

9. **Same—Authority of County Attorney.** An action against a city officer for transferring property of the city or paying out its money on a fraudulent claim, under Comp. Laws 1909, secs. 7413, 7414, cannot be maintained in the name of the state on relation of the county attorney. *Idem* 545
10. **Same—Limitation of Actions.** A taxpayers' action, authorized by Comp. Laws 1909, secs. 7413-7414, in the name of the state to recover double the value of property transferred or money misappropriated by a city officer on a fraudulent claim, is an action to recover a penalty, and barred after one year by section 5550. *Idem* 545
11. **Ordinances—Presumed Validity—Sidewalks.** A municipal ordinance providing for a public improvement is presumptively valid, and will not be set aside by the courts unless it appears that the discretion imposed on the municipal authorities has been abused or arbitrarily exercised. *Seminole Townsite Co. v. Town of Seminole* 558
12. **Incorporated Town Tax—Levy—Collection.** Constitution, art. 10, sec. 19, construed, and held to require the board of trustees of an incorporated town, in assessing annual taxes pursuant to Comp. Laws 1909, sec. 847, and in order to specify distinctly the purpose for which said tax is levied, by resolution or order, to adopt an estimate of expenditures and fix a tax levy to raise it and certify the same to the county commissioners, to be by them levied and collected as other taxes. *St. Louis & S. F. R. Co. v. Tate* 563
13. **Public Libraries — Trusts — Enforcement — Taxpayers' Action.** Where a donor offered \$10,000 to construct a library provided the city would donate the site and maintain the library, which proposition the city accepted, the city's title to the property was that of trustee for the public, and the court had jurisdiction in a taxpayer's action to prevent the city's officers from using the building for city offices. *Perry Public Library Ass'n v. Lobsitz* 576
14. **Defective Streets—Liability.** A municipality is relieved from liability for the defective condition of its streets only when it has no means within its control to effect repairs. *Town of Fairfax v. Giraud* 659
15. **Same.** A traveler on a city street has a right to presume that it is in a reasonably safe condition for ordinary travel by day or night, throughout its entire width, and that it is free from dangerous holes and obstructions. *Idem* 659
16. **Same—Action for Personal Injuries—Burden of Proof.** In an action against a municipality for personal injuries due to a defective street, there is no presumption of negligence on either party, and the burden is on defendant to prove plaintiff's contributory negligence. *Idem* 659

N.

NAMES:

1. **Right of Person to Change Name.** Although the custom is universal for all male persons to bear the name of their parents, there is nothing in the law prohibiting a man from taking another name, if he so desires; nor is there any penalty or punishment for so doing. **Roberts v. Mosier** 691
2. **Same—Effect Upon Contracts.** A contract or obligation may be entered into by a person by any name he may choose to assume. The law only looks to the identity of the individual, and when that is clearly established the act, when free from fraud, will be binding. **Idem** 691

NECESSARIES—See “Infants.”

NEGLIGENCE—See “Appeal and Error,” 68; “Banks and Banking”; “Carriers,” 14-17; “Damages”; “Master and Servant”; “Municipal Corporations,” 1, 2, 14-16.

Pleading—Contributory Negligence—Admissions. In an action for personal injuries, where defendant denies generally, and alleges contributory negligence, the latter allegation is not an implied admission of negligence, rendering proof of negligence unnecessary, and limiting the issues to that of contributory negligence. **Clemens v. St. Louis & S. F. R. Co.**..... 667

NEGOTIABLE INSTRUMENTS—See “Bills and Notes.”

NEWSPAPERS—See “Appeal and Error,” 34.

NEW TRIAL—See “Appeal and Error,” 10, 11, 13, 35, 36, 62, 63, 67, 68.

1. **Grounds—Death of Judge.** Where, prior to the passage of Sess. Laws 1910, c. 39, a trial judge died within the time allowed to sign and settle the case-made, his successor was not authorized to perform such duty; and the aggrieved party will be given a new trial. **Duffield v. Ingraham** 11
2. **Newly Discovered Evidence—Admissions.** In a suit on account for \$25 per week for services, where plaintiff recovered the full amount, newly discovered evidence that plaintiff during his term of service had admitted that he was drawing \$20 per week was new evidence, and not cumulative. **Goldie v. Corder**..... 247
3. **Discretion of Court—Failure to Save Exceptions.** Where no exceptions are saved to alleged errors at the trial, though assigned in the motion for new trial as grounds therefor, the motion is merely addressed to the discretion of the court. **Muskogee Electric Traction Co. v. Reed** 334

NOTES—See “Bills and Notes.”

NOTICE—See “Exemptions”; “Homestead”; “Landlord and Tenant.”

O.

OFFICERS—See “Clerks of Courts”; “Constitutional Law,” 2; “Counties”; “Drains”; “Fines”; “Municipal Corporations,” 3, 4, 8-13; “Public Lands”; “Schools and School Districts”; “Statutes.”

OIL AND GAS—See “Gas”; “Indians,” 8, 10; “Mines and Minerals”; “Receivers.”

ORDINANCES—See “Injunction,” 7, 8; “Municipal Corporations,” 11.

P.

PARENT AND CHILD—See “Adoption”; “Descent and Distribution.”

PAROL EVIDENCE—See “Appeal and Error,” 72; “Evidence,” 3, 7.

PARTIES—See “Appeal and Error,” 15-25; “Guardian and Ward,” 2-4; “Judgment”; “Municipal Corporations,” 8, 9.

Substitution—Injunction of Execution. Where, in a suit to restrain execution of a judgment, on the ground that the land levied on was a homestead, the title thereto being at the time in the United States, but subsequently proven up, an amendment, striking out the name of plaintiff and substituting that of his wife, was properly allowed, under Wilson’s Rev. & Ann. St. 1903, sec. 4343. **Rader v. Gvozdanovic** -----

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PARTNERSHIP:

1. **Contracts—Use of Firm Name—Liability of Copartner.** One partner cannot bind his copartner by any contract not within the scope of the partnership, unless with his copartner’s consent. **Brown v. First Nat. Bank** -----
2. **Same—Ratification by Copartner.** That a partner on being informed that his copartner has given a firm note for items including his individual debt does not deny his liability does not ~~per se~~ amount to ratification or adoption of the note for the whole debt. **Idem** -----
3. **Same.** Knowledge and assent of a copartner to a contract made by his copartner not within the scope of the partnership must be affirmatively shown. **Idem** -----
4. **Same—Silence as Ratification.** Where a partner has signed the firm name to a note to a bank for money used for other than firm purposes, to the knowledge of the officers of the bank, the other partner is not liable as a matter of law for items included therein not within the scope of the partnership by failing to express his dissent when demand of payment is made. **Idem** -----

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PENALTIES—See “Fines”; “Municipal Corporations,” 8-10.

PERSONAL INJURIES—See “Appeal and Error,” 68; “Damages”; “Master and Servant”; “Municipal Corporations,” 14-16; “Negligence.”

PETITION—See “Appeal and Error,” 37, 74; “Injunction,” 1, 2; “Limitation of Actions”; “Pleading”; “Removal of Causes”; “Vendor and Purchaser.”

Petition in Error—See “Appeal and Error.”

PHYSICIANS AND SURGEONS—See “Prohibition.”

PIANOS—See “Exemptions.”

PLEADING—See “Appeal and Error,” 1, 37, 70, 72-74; “Attorney and Client,” 9; “Bills and Notes”; “Carriers,” 4; “Chattel Mortgages”; “Injunction,” 1, 2; “Limitation of Actions”; “Negligence”; “Removal of Causes”; “Vendor and Purchaser.”

1. **Answer—Effect.** Where a pleading styled an answer contains an allegation to the effect that the petition does not state facts sufficient to constitute a cause of action, coupled with allegations of facts constituting a defense, and thereafter a general denial by way of a reply is filed thereto, it was not error for the court below to disregard the allegations attacking the petition and require the parties to proceed to trial, when the case was reached for that purpose upon the issues of fact joined by the petition, answer, and reply. **Title Guaranty & Surety Co. v. Slinker** 128, 153
2. **Defective Verification—Waiver.** Where a temporary restraining order is granted by a judge at chambers, without notice, solely upon the face of a petition improperly verified, the defect in the verification is waived where, without raising it, defendant answers to the merits. **Galbreath Gas Co. v. Lindsey** 235
3. **Demurrer—Form.** A demurrer to an answer, which alleges “that the second clause of the first paragraph of the answer is not responsive to an allegation contained in the petition,” and that “the third clause of said paragraph is evasive,” and of another paragraph “that the same states conclusions of law and is not responsive * * * to the allegations * * * of the petition,” is insufficient under the statute, and was improperly sustained. **Idem** 235
4. **Objections and Waiver—Irrelevancy and Redundancy.** Irrelevancy and redundancy contained in a pleading is waived by failing to move to strike it in the trial court. **Hunt v. Jones** 252
5. **Petition—Answer—Verification—Necessity.** Where a petition alleges that H. was the legal guardian of N., and the answer is an unverified denial, it is an admission that H. is such legal guardian. **Tate v. Stone** 369
6. **Petition—Exhibits—Effect.** It is not good practice to make a mere exhibit a part of the petition, the better mode being to make a direct statement of the fact; but when an exhibit is made a part of the petition, reference may be had to the exhibit to determine whether a cause of action has been stated, so as to withstand a general demurrer. **Long v. Shepard** 489
7. **Same—Denial Under Oath.** Where an instrument not required by statute to be attached as an exhibit is attached to a petition, and its execution is alleged and its substance pleaded, its execution will be taken as admitted, if not denied under oath on trial. **Idem** 489

PLEADING—Continued.

8. **Judgment on Pleadings.** When, under the allegations of the petition and the admissions in the answer, the plaintiff is entitled to judgment on the pleadings, it is error to deny a motion made for such purpose. *Idem* 489
9. **Same—Validity of Deed to Indian Land.** Where the pleadings aver that a citizen of the Creek Nation, by a clause in a deed executed prior to Act April 26, 1906, sec. 19, and before the restrictions were removed from the allotment of the grantor, agreed to execute a conveyance when his restrictions were removed, and such agreement is attached to the petition as a part thereof, and its execution is not denied, and it is averred that after removal of the restrictions the grantor executed a deed pursuant to the stipulation, the latter deed is void; and judgment to that extent should be entered on the pleadings. *Idem* 489
10. **Motion to Make More Definite and Certain—Time—Extension of Time “to Plead.”** A motion to make more definite and certain, which is provided for by section 5659, Comp. Laws 1909, may be made at any time within the period allowed to answer or demur by section 5645, Comp. Laws 1909, and if the defendant obtains an extension of time in which “to plead,” he does not thereby waive the right to make such motion within the time so extended. *St. Louis & S. F. R. Co. v. Young* 521
11. **Judgment on Pleadings—Undisposed of Motion.** Where a motion to make a petition more definite and certain, not frivolous, has been filed by a party within the time to plead, and is pending undisposed of and not waived, a judgment upon the pleadings against the defendant cannot be taken. *Idem* 521
12. **Petition—Amendment—Demurrer.** Where an amended petition is complete in itself and contains no reference to any prior petition or exhibits thereto attached, the allegations of such prior petitions, except as repeated in the amended petition, will be deemed abandoned, and the court cannot look to preceding petitions in determining a demurrer to the amended petition. *Territory ex rel. v. Woolsey* 545
13. **Petition—Sufficiency—Objection at Trial.** Where there has been no objection to the petition by demurrer or motion, an objection to the introduction of evidence on the ground that the petition is insufficient will be overruled, unless there is a total failure to allege facts entitling plaintiff to the relief sought. *Missouri, O. & G. Ry. Co. v. McClellan* 609
14. **Sufficiency of Petition—Construction on Appeal.** Where a petition is attacked for the first time on appeal as not stating a cause of action, it will be liberally construed to uphold the judgment, as required by Comp. Laws 1909, sec. 5655. *Cook v. State* 653

POOR—See “Counties,” 3.

POSSESSION — See “Auctions and Auctioneers”; “Champerty and Maintenance”; “Chattel Mortgages”; “Forcible Entry and Detainer”; “Injunction,” 6; “Sales,” 2.

PRACTICE—See “Appeal and Error”; “Pleading”; “Trial.”

PRACTICE OF LAW—See “Attorney and Client.”

PRACTICE OF MEDICINE—See “Prohibition.”

PRINCIPAL AND AGENT—See “Banks and Banking”; “Brokers”; “Frauds, Statute of”; “Vendor and Purchaser.”

Wrongful Act—Liability of Agent. An agent, who converts the property of a third person, is liable for such conversion; and it is no defense that his acts were committed in pursuance of his employment and for the benefit of his principal. **Butler v. Corey**----- 471

PRINCIPAL AND SURETY—See “Bail”; “Guardian and Ward,” 2-4.

1. **Construction of Contract.** Comp. Laws 1909, sec. 1569, relating to construction of obligations of a surety, guarantor, or indemnitor for hire, prescribes a rule of construction, but does not otherwise affect the rights of a surety, where there is no ambiguity in the contract of suretyship. **Columbia Bank & Trust Co. v. Southern Surety Co.**----- 401

2. **Remedies of Surety—Action Against Principal.** A surety may maintain an action against his principal to compel him to discharge the debt or liability after it has become due. **Idem**----- 401

PRIVILEGED COMMUNICATIONS—See “Libel and Slander.”

PROBATE PROCEEDINGS—See “Courts”; “Guardian and Ward”; “Indians,” 7.

PROCESS—See “Appeal and Error,” 26.

PROHIBITION:

1. **Orders of Corporation Commission—Highway Crossings of Railroad.** Where the Corporation Commission orders a public crossing to be installed by a railroad company at a point where there is no lawful highway, prohibition may issue to prevent the enforcement of the order. **St. Louis & S. F. R. Co. v. Corporation Commission of Oklahoma**----- 168

2. **Ministerial Functions.** A writ of prohibition will not lie to an executive or ministerial board to prohibit it from the performance of its functions. **Jamieson v. State Board of Medical Examiners**----- 685

3. **Same—State Medical Examiners—Revocation of License.** The state medical examiners in hearing charges under Comp. Laws 1909, secs 4242-4264, for the purpose of revoking a license as obtained by fraud, and because of the unprofessional conduct of the certificate holder, is engaged in the performance of a ministerial duty, and a writ of prohibition thereto will not lie. **Idem**----- 685

PROMISSORY NOTES—See “Bills and Notes.”

PROSECUTING ATTORNEYS—See “County Attorneys.”

PROXIMATE CAUSE—See “Appeal and Error,” 6, 8.

PUBLIC IMPROVEMENTS—See “Mandamus”; “Municipal Corporations,” 5, 6, 11, 13.

PUBLIC INDEBTEDNESS—See “Counties,” 13; “Mandamus”; “Municipal Corporations,” 8-10, 12; “Schools and School Districts”; “Taxation,” 12; “Townships.”

PUBLIC LANDS—See “Parties.”

1. **Town Sites—Rights of Prior Lot Occupant.** Where a town site is entered under Rev. St. secs. 2387, 2388 (U. S. Comp. St. 1901, pp. 1457, 1458), and the town-site laws of Kansas put in force in Oklahoma by Act March 3, 1891 (26 Stat. 1026, c. 543 [U. S. Comp. St. 1901, p. 1617]), the probate judge takes title in trust; and where a lot is continuously in the occupancy of a prior settler he is not deprived of his right by award of the town-site commissioners and a subsequent deed by the judge to another. **Walter Realty Co. v. Jones** -----

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2. **Same—Findings of Commissioners—Review.** Findings of town-site commissioners appointed by the probate judge are only advisory; and the court may, on a proper showing, re-examine the questions. **Idem** -----

272

3. **Town Sites—Reservation for County Seats.** The devolution of title to lots on town sites in the Cheyenne and Arapaho country reserved for county-seat purposes by the Secretary of the Interior is governed by sections 2387 and 2388, Revised Statutes of the United States (U. S. Comp. St. 1901, pp. 1457, 1458), and the town-site laws of the state of Kansas, as modified by the act of Congress of March 3, 1891, c. 543, sec. 17, 26 St. at L. 1026. **League v. Town of Taloga** -----

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4. **Same—Reservation for Municipal Purposes.** The authority to reserve not to exceed one-half section of land in each county in the Cheyenne and Arapaho country for county-seat purposes, conferred upon the Secretary of the Interior by section 17 of the act of March 3, 1891, c. 543, 26 St. at L. 1026, embraced the power to set aside for public purposes such lots or parcels of ground situated upon such town site as, in the judgment of the Secretary, would be necessary for the municipal needs and conveniences of a county-seat town. **Idem** -----

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PUBLIC LIBRARIES—See “Municipal Corporations,” 13.

PUBLIC OFFICERS—See “Officers.”

PUBLIC SERVICE CORPORATIONS—See “Carriers”; “Gas”; “Prohibition”; “Railroads”; “Taxation,” 5-11; “Telegraphs and Telephones.”

PUBLIC UTILITIES—See “Mandamus.”

Q.

QUARANTINE—See “Carriers,” 6-8; “Counties,” 5.

QUESTIONS OF FACT—See “Appeal and Error,” 56-66.

QUIETING TITLE—See “Appeal and Error,” 20.

R.

RAILROADS—See “Carriers”; “Mandamus”; “Master and Servant”; “Prohibition.”

Highway Crossings—Power of Corporation Commission to Require. Where no highway or crossing has been lawfully established over the right of way of a railroad, the Corporation Commission has no jurisdiction to require the installation of a crossing at such point. *St. Louis & S. F. R. Co. v. Corporation Commission of Oklahoma*. . . . 166

RAPE—See “Appeal and Error,” 6.

1. **Civil Liability of Perpetrator.** Rape of a female gives her a cause of action for damages against the perpetrator. *Watson v. Taylor* 768
2. **Definition.** “Rape” under Comp. Laws 1909, sec. 2353, sub-sec. 2, is an act of sexual intercourse accomplished with a female not the wife of the perpetrator where the female is over the age of 16 years and under the age of 18, and of previous chaste and virtuous character. *Idem* 768
3. **Consent as Defense.** To show that a female over 16 and under 18 years of age consented to the act or acts of sexual intercourse will not constitute a defense to a civil action for damages for rape. *Idem* 768
4. **Sufficiency of Evidence.** Evidence, in an action for damages for rape, held to authorize submission of the cause to the jury and to sustain the verdict for plaintiff. *Idem* 768
5. **Admissibility of Evidence—Offspring as Exhibit.** In an action for damages for rape, a child two and one-half years of age alleged to be the fruit of the illicit intercourse may be exhibited to the jury to establish the facts of birth and of prior unlawful intercourse. *Idem* 768

RATES—See “Carriers”; “Gas.”

RATIFICATION—See “Partnership.”

REAL ESTATE AGENTS—See “Brokers.”

RECEIVERS:

Appointment—When Authorized. Under Comp. Laws 1909, sec. 5772, where the rents and profits of land in litigation are being removed, a receiver should be appointed without reference to the probable insolvency of the party against whom the proceedings are brought. *Hughes v. Garretts* 321

RECOGNIZANCES—See “Bail.”

RECORDS—See “Adoption”; “Appeal and Error,” 33-49; “Evidence,” 2, 3; “Indians,” 12; “Mines and Minerals.”

REFERENCE—See “Taxation,” 6, 11.

REGISTRATION—See “Indians,” 12; “Mines and Minerals.”

REHEARING—See “Appeal and Error,” 12.

REMOVAL OF CAUSES:

1. **Actions Under Employers' Liability Act.** Act Cong. April 5, 1910, amending Employers' Liability Act, sec. 6, providing that jurisdiction of federal courts shall be concurrent with that of the state courts and that no case arising thereunder brought in the state court shall be removable, does not apply to actions prior to the amendment. **Ft. Smith & W. R. Co. v. Blevins**..... 378
2. **Increase of Ad Damnum by Amendment.** Where plaintiff amends his petition, increasing the damages so as to create a removable cause and, if defendant by due application avails himself of the right to remove, it cannot be denied. **Idem** 378
3. **Petition for Removal—Effect on Jurisdiction.** Under Act March 3, 1887, amending Judiciary Act 1789, as amended by Act Aug. 13, 1888, where a nonresident defendant duly files his petition for removal and a sufficient bond, the state court is *ipso facto* ousted of jurisdiction. **Idem** 378

RENT—See “Landlord and Tenant.”

REPLEVIN—See “Chattel Mortgages.”

REPLY—See “Pleading,” 1.

RESCISSION—See “Sales,” 3; “Vendor and Purchaser.”

RESTRAINT OF TRADE—See “Fines”; “Gas.”

REVENUE—See “Taxation.”

REVIEW—See “Appeal and Error.”

RULES OF COURT—See “Briefs.”

S.

SALARIES—See “Counties,” 4.

SALES—See “Auctions and Auctioneers”; “Exemptions”; “Frauds, Statute of”; “Fraudulent Conveyances”; “Landlord and Tenant”; “Vendor and Purchaser.”

1. **Action for Price—Fraud as a Defense.** Where several persons, for the purpose of buying a horse, mutually agree to pay a certain price for him, a secret agreement between the vendor and one of them, whereby he received his share in the horse for nothing for securing the others to join with him in the purchase, is such a fraud as will entitle defendants to defeat recovery on the notes evidencing their promise to pay the purchase money. **Noble v. Fox** 70
2. **Transfer of Title—Bill of Lading.** Where a merchant draws a draft for the part of the price of goods consigned, with notes and mortgage to be executed for the balance, and transmits the same with bill of lading to a bank to collect the draft, and have the notes and mortgage executed, it shows the consignor's intent to reserve title and right of possession until draft is paid and papers executed. **St. Louis Carbonating & Mfg. Co. v. Lookaba State Bank** 434

SALES—Continued.

3. **Remedies of Parties—Recovery of Price.** Where an agent for plaintiff, a manufacturing concern, delivered a buggy with a defective wheel to defendant with the understanding at the time that no purchase was made unless a new and perfect wheel was furnished, recovery cannot be had upon the note given for the purchase price, where the wheel was not furnished as agreed, and the buggy was tendered back. **Spaulding Mfg. Co. v. Lowe** 559
4. **Place of Delivery.** In the absence of any contrary provision in a contract of sale, the place of delivery is the place where the goods are located when sold. **Lodwick Lumber Co. v. E. A. Butt Lumber Co.** 797
5. **Same—Contract.** Where plaintiff, a lumber company, with its mills at A., contracted to sell and deliver to defendants, a lumber company with its yards at W., a car of lumber, the contract being silent on the subject, the place of delivery is at A. **Idem** 797
6. **Same—Delivery at Other Place—Effect.** Where defendant, a lumber company with its yards at W., ordered of plaintiff, with its mills at A., a car of lumber to be delivered at that place, it was not bound to accept delivery of the lumber from another lumber company at another place. **Idem** 797
7. **Same—Action for Price—Evidence of Delivery.** Where property is to be delivered at the place where it is located when sold, the seller, before he can recover the price, is bound to prove delivery at that place. **Idem** 797

SCHOOLS AND SCHOOL DISTRICTS—See "Judgment"; "Limitation of Actions"; "Taxation," 13, 16.

1. **Election of Board in City—Liability for Expenses.** A municipality under a charter form of government, under Const. art. 18, secs. 3a, 3b, providing for a board of education to be elected under the grant by Act March 28, 1910 (Sess. Laws 1910, c. 113, sec. 1), under Sess. Laws 1909, c. 16, art. 1, secs. 7, 8, and not the board of education, is liable for expenses of elections of members of the school board. **State v. Board of Education of Oklahoma City** 93
2. **School Buildings—Contract—Public Policy.** A contract, made with a school district board by a county superintendent of the county in which such school district was located, to build a schoolhouse for said district, is void as being against public policy. **Farmers' & Merchants' Nat. Bank v. School Dist. No. 56** 506
3. **School Tax—Estimate of Expenditures.** Constitution, art. 10, sec. 19, Comp. Laws 1909, secs. 8056, 8093, 8117, construed, and held to require the local legislative body of the school district to distribute the tax voted at the annual school meeting of the district in payment of an estimate of the expenditures authorized to be incurred by Comp. Laws 1909, sec. 8056, and thus show for what purpose the tax was levied, and certify the same to the district clerk. **St. Louis & S. F. R. Co. v. Tate** 563

SETTLEMENT—See "Compromise and Settlement"; "Guardian and Ward," 1-3.

STATE FUNDS—See "Banks and Banking."

STATES—See “Banks and Banking”; “Carriers,” 12, 13; “Commerce”; “Removal of Causes”; “Taxation,” 7.

STATUTE OF FRAUDS—See “Frauds, Statute of.”

STATUTE OF LIMITATIONS—See “Limitation of Actions.”

STATUTES—See “Appeal and Error,” 1, 2, 27, 28, 70; “Attorney and Client,” 1, 2, 4, 7, 9; “Bail”; “Banks and Banking”; “Carriers,” 4, 18; “Champerly and Maintenance”; “Clerks of Courts”; “Commerce”; “Constitutional Law”; “Counties”; “Courts”; “Descent and Distribution”; “Drains”; “Elections”; “Exemptions”; “Fines”; “Fraudulent Conveyances”; “Gas”; “Guardian and Ward,” 5, 6; “Habeas Corpus”; “Indians”; “Injunction,” 2, 3, 5; “Judges”; “Jury”; “Libel and Slander”; “Municipal Corporations,” 3, 5, 7, 9, 10, 12; “New Trial”; “Parties”; “Pleading,” 9, 10; “Principal and Surety”; “Prohibition”; “Public Lands”; “Rape”; “Receivers”; “Removal of Causes”; “Schools and School Districts”; “Taxation,” 1-3, 12, 13, 15; “Time”; “Townships”; “Trial.”

1. **Interpretation—Construction by Officers.** The construction placed on statutes or constitutional provisions by officers in the discharge of their duties, either at or near the time of the enactment, which has been long acquiesced in, is a just medium for its judicial interpretation. *League v. Town of Taloga* 277
2. **Construction—Levy of Tax.** Where a statute imposing a tax is susceptible of two constructions, and the legislative intent is in doubt, the doubt should, as a rule, be resolved in favor of the taxpayer. *Adams v. Com'rs Garvin County* 440

STIPULATIONS—See “Judgment.”

SUCCESSION—See “Descent and Distribution.”

SUMMONS—See “Appeal and Error,” 17, 19, 26.

SUNDAYS—See “Time.”

SURETYSHIP—See “Principal and Surety.”

T.

TAXATION — See “Counties,” 5; “Courts”; “Municipal Corporations,” 5, 6, 8-10, 12, 13; “Statutes.”

- 1 **Equalization—Power of State Board.** Sess. Laws 1899, c. 28, art. 3, sec. 1, limiting the power of the State Board of Equalization to the aggregate valuation as returned by the county boards, if valid when passed, and not repugnant to the Constitution, was repealed by Comp. Laws 1909, sec. 7620. *Appeal of McNeal* 17
2. **Same.** Comp. Laws 1909, sec. 7620, making it the duty of the State Board of Equalization to equalize the valuation as between counties by increasing or decreasing the aggregate assessed value, is not repugnant to Const. art. 10, sec. 21, defining the duties of the board. *Idem* 17
3. **Same.** Under Const. art. 10, sec. 21, requiring the State Board of Equalization to equalize the valuation of the property of the

TAXATION—Continued.

several counties, and Comp. Laws 1909, sec. 7620, making it the board's duty to equalize the valuation between the counties, the action of the board is not void because it raised the aggregate assessment returned by the county clerks. *Idem* 17

4. **Same.** The action of the State Board of Equalization in adjusting the various county assessments by increasing or decreasing the value in any or all of the different classes of real and personal property to make their valuation conform to the fair cash value is valid. *Idem* 17

5. **Assessment by State Board—Appeal—Trial De Novo.** On appeal from an order of the State Board of Equalization, assessing the property of a public service corporation, the trial is *de novo*, and evidence may be introduced by both parties without being confined to that introduced before the board. *In re Assessment of Osage & Oklahoma Gas Co.* 154
In re Assessment of Oklahoma Natural Gas Co. 711
In re Assessment of Caney River Gas Co. 712

6. **Same—Referee's Report—Sufficiency of Evidence.** On appeal from an order of the State Board of Equalization fixing the value of a corporation's property for taxation, evidence held to sustain the report of a referee that the company's taxable property was worth \$400,000. *Idem* 154, 711, 712

7. **Assessments—Basis—Interstate Telegraph Company.** In estimating for taxation the value of a telegraph company's property within a state, it may be regarded as a part of a system operated in other states, and the taxing state is not precluded from taxing the property because it did not create the company or confer its franchise, nor because the company derived rights under an act of Congress or is engaged in interstate commerce. *In re Assessment of Western Union Telegraph Co., 1911, 1912.* 626

8. **Same—Nature of Proceeding.** The valuation of property for taxation is in its nature a judicial act, and, where the value of corporate property is in dispute, the judgment must be based on competent evidence weighed in a judicial manner. *Idem.* 626

9. **Same—Depreciations.** In a proceeding to assess the property of an interstate telegraph company for taxation, it is presumed that any natural depreciations are provided for by replacements paid out of the net earnings of the company, and that the company as a whole is kept at an ordinary state of efficiency. *Idem* 626

10. **Same—Mileage Valuation.** It is presumed that all the property of an interstate telegraph company is part of its plant, and that its tangible and intangible property is equally distributed throughout its mileage. *Idem* 626

11. **Same—Appeal—Reference—Findings.** On appeal from the action of the State Board of Equalization in assessing an interstate corporation for taxation, wherein a referee is appointed to make findings of fact and conclusions of law, the court may set aside the findings and conclusions if erroneous, and substitute therefor its own findings and conclusions based on the same evidence. *Idem* 626

TAXATION—Continued.

12. **Limitation of Amount—Powers of Excise Board—Townships.** Under Laws 1910, c. 64, the county excise board cannot levy during one year for township purposes a tax in excess of the estimate by the township directors, and an additional 10 per cent. for delinquent taxes, and any tax in excess of such amount may be restrained. *St. Louis & S. F. R. Co. v. Thompson*..... 138
13. **Same—Effect of Statutes—School Districts.** Laws 1910, c. 64, relating to the levy of township taxes by the county excise board, operates prospectively only, and does not avoid taxes levied before it became effective by school districts under the procedure then prescribed. *Idem* 138
14. **Levy—Specification of Purpose.** Section 19, article 10, of the Constitution (Williams' Ann. Const., sec. 284), which requires that every act of the Legislature levying a tax shall specify distinctly the purpose for which the tax is levied, is mandatory, and an act levying an annually recurring tax, which does not specify the purpose for which the tax is levied, is void. *Meyer v. Lynde-Bowman-Darby Co.* 480
15. **Same—Validity of Statute—Graduated Land Tax.** The act of May 26, 1908 (Sess. Laws 1907-08, p. 725; Comp. Laws 1909, secs. 7738-7742), providing for a graduated tax on land holdings, is in conflict with section 19, article 10 of the Constitution, because it fails to specify the purpose for which the tax is levied. *Idem* 480
16. **Excessive Levy—Collection—Injunction.** Where, in certain school districts, towns, and townships, a tax of a certain number of mills, for the purpose of paying their respective estimates of expenses for the ensuing year, was levied when a lesser levy would be more than sufficient to raise the amount necessary to pay said estimates, and where the lesser has been paid, and where the county treasurer and the sheriff are threatening to collect from plaintiff the balance, held that said balance is excessive and illegal, and that it was error to refuse to restrain its collection. *St. Louis & S. F. R. Co. v. Tate* 563

TELEGRAPHS AND TELEPHONES—See "Taxation," 7-11.

Regulation by Corporation Commission. Cause remanded to commission for further investigation and additional evidence. *Western Union Tel. Co. v. State* 209

TENANCY—See "Landlord and Tenant."

TENDER—See "Sales," 3.

THEORY OF CASE—See "Appeal and Error," 5, 6.

TIME:

Appeal—Exclusion of Sundays. Under Comp. Laws 1909, sec. 6258, where the last day of the six months allowed for bringing a proceeding in error expires on Sunday, such day is to be excluded in computing the time for commencing the proceeding. *Grant v. Creed* 190

TITLE—See "Appeal and Error," 20; "Auctions and Auctioneers"; "Champerly and Maintenance"; "Estoppel"; "Indians," 6; "Injunction," 6; "Sales," 2.

TORTS—See “Damages”; “Libel and Slander”; “Master and Servant”; “Municipal Corporations,” 1, 2, 14-16; “Negligence.”

TOWNS—See “Municipal Corporations,” 6, 12.

TOWNSHIPS—See “Taxation,” 12, 13, 16.

1. **Bridge Bonds—Validity.** Section 1, c 99 (Sess. Laws 1910-11, p. 211), does not authorize a township through which a stream flows to issue bonds to bridge said stream at some point within the township, although such stream forms part of the boundary of the county in which such township lies. **In re Bridge Bonds, Rathlf Tp.** 192
2. **Same.** Said statute authorizes the township to issue bonds for the construction of the bridge across a river or stream only when such river or stream forms the boundary of said township, and also the boundary of the county in which said township lies, and the bridge is to be constructed across the stream where it constitutes the common boundary of the township and county. **Idem** 192
3. **Levy of Taxes—Township Board—Budget.** Comp. Laws 1909, secs. 7624-7626, 8730-8735, construed, and held to require the township board of directors to make out an estimate of the amount of money necessary to defray the township expenses during the ensuing year; the same to be attested and filed with the clerk of the county to enable the county commissioners to proceed with the levy. **St. Louis & S. F. R. Co. v. Tate** 563

TOWN SITES—See “Public Lands.”

TRANSCRIPT OF RECORD—See “Appeal and Error,” 36, 37.

TRANSITORY ACTIONS—See “Venue.”

TRIAL—See “Appeal and Error,” 7-9, 12, 37, 57, 67, 68, 71, 73; “Carriers,” 4; “Constitutional Law,” 1, 4; “Drains”; “Evidence,” 6; “Forcible Entry and Detainer”; “Jury”; “Justices of the Peace”; “Libel and Slander”; “Municipal Corporations,” 16; “Negligence”; “New Trial”; “Pleading,” 1, 13; “Taxation,” 5, 8, 11.

1. **Evidence—Directing Verdict.** Where plaintiff brings action to recover possession of certain real estate on the theory that the same is the homestead of himself and family, but on the trial thereof offers no proof to sustain such claim, it is not error for the trial court to direct a verdict against him. **Kelley v. Reynolds** 37
2. **Demurrer to Evidence — Uncontroverted Evidence.** All facts showing without contradiction a delivery of a deed executed by plaintiffs, Indian allottees, April 8, 1905, when they were free from restrictions on alienation, it was not error to sustain a demurrer to the evidence of plaintiffs. **Bentle v. McCoy** 77
3. **Time of Trial—Issues.** Under Comp Laws 1909, sec. 5834, providing when actions are triable, and section 5832 that witnesses shall not be subpoenaed while the case stands on issues of law, when a nonfrivolous demurrer has been overruled, the case is not triable on issues of fact until ten days after the filing of the answer. **City of Ardmore v. Orr** 305

TRIAL—Continued.

4. **Time of Trial—Making of Issues.** Where issues are made up during a term of court, the case is not triable at that term earlier than ten days after issues are made up, as provided by Comp. Laws 1909, sec. 5834. *Conwill v. Eldridge* 537
5. **Same—Right to Delay—Waiver.** The right of a litigant, conferred by Comp. Laws 1909, sec. 5834, to delay a trial at the same term until ten days after the issues are made up, is waived by failing to object that the case is improperly set for trial, and moving for a continuance for absence of witnesses. *Idem* 537
6. **Instructions—Refusal.** A request to charge may be properly refused, though correct, where its subject is fully covered by instructions given. *St. Louis & S. F. R. Co. v. Bilby* 539
7. **Findings by Court.** Under Comp. Laws 1909, sec. 5809, on trial by the court it is not necessary for the court to state its findings, except generally, unless a request therefor was made. *Cook v. State* 653

TROVER AND CONVERSION—See “Principal and Agent.”

TRUSTS—See “Fines”; “Fraudulent Conveyances”; “Gas”; “Municipal Corporations,” 13; “Public Lands.”

U.

USAGES—See “Customs and Usages.”

V.

VENDOR AND PURCHASER—See “Bills and Notes”; “Brokers”; “Champerty and Maintenance”; “Decds”; “Estoppel”; “Evidence,” 7; “Frauds, Statute of”; “Fraudulent Conveyances”; “Guardian and Ward,” 7, 8; “Homestead”; “Indians”; “Pleading,” 9; “Sales.”

1. **Rescission of Contract—Grounds—Fraud.** As a rule, one who has entered into a contract to purchase realty under the influence of fraudulent representations of the seller may rescind the contract and recover the purchase money if paid, or avoid its payment if unpaid. *Schechinger v. Gault* 416
2. **Same—Recovery of Purchase Money—Petition.** A petition by a purchaser of land against the agent of the vendor, alleging the latter's false representation that his principal owned the title in fee, whereas the land was a homestead, and the principal's wife refused to join in the contract, states a cause of action for recovery of the portion of the purchase money paid. *Idem* 416

VENUE:

Transitory Actions. Where an action is brought to recover damages occasioned by an alleged conspiracy on the part of defendants to deny plaintiffs the right to use certain land for pasture for cattle, and no judgment or relief is asked as to the real estate, the same involves damages to personal property, and is therefore transitory. *Dunn et al. v. District Court of Carter County*.... 38

VERDICT—See “Appeal and Error,” 12; “Damages,” 6; “Libel and Slander,” “Trial,” 1.

VERIFICATION—See “Attorney and Client,” 7, 8; “Carriers,” 4; “Injunction,” 2; “Pleading,” 2, 5, 7.

W.

WAGES—See “Municipal Corporations,” 7.

WATERS AND WATER COURSES—See “Municipal Corporations,” 1, 2.

WITNESSES—See “Evidence,” “Continuance.”

Knowledge—Testimony from Writing. In an action against a connecting carrier for loss of goods, a witness who had no knowledge of the weight of the car when delivered to the connecting carrier, and had never been in its employ, and was not connected with the execution of the waybill, could not testify as to the weight of the car from the bill when received by the connecting carrier. *St. Louis, I. M. & S. Ry. Co. v. Carlile* ----- 118

WORDS AND PHRASES:

“Issue.” In its legal sense as used in statutes and wills and deeds and other instruments, “issue” means descendants; lineal descendants; offspring. *Schafer v. Ballou* ----- 169

WORK AND LABOR—See “Municipal Corporations,” 7.

WRITS—See “Execution,” “Habeas Corpus,” “Injunction,” “Mandamus,” “Prohibition.”

Writ of Error—See “Appeal and Error.”

Verdict
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